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Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, PETITIONER,

vs.

DEAN RUSK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 14, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. A]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,959

ANGELIKA L. SCHNEIDER, Appellant,

v.

CHRISTIAN A. HERTER, individually and as Secretary of State, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Joint Appendix

[fol. 1]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, Badenbergerstrasse 20, Koeln-Elirenfeld, Germany, Plaintiff,

v.

CHRISTIAN A. HERTER, individually and as Secretary of State

COMPLAINT FOR INJUNCTION, DECLARATORY JUDGMENT, AND OTHER RELIEF—Filed February 1, 1960

Plaintiff by her attorneys, complaining of defendant, alleges that:

1. Plaintiff is a naturalized citizen of the United States and is a resident of West Germany, residing with her hus-

band in a suburb of Cologne, Germany. Her address there is Badenbergerstrasse 20, Koeln-Ehrenfeld, Germany.

2. The defendant, Christian A. Herter, is an individual doing business and residing in the District of Columbia with offices at 21st Street and Virginia Avenue, N.W., Washington, D.C., and is Secretary of State of the United States. Said defendant is sued individually and a. Secretary of State.

[fol. 2] 3. Jurisdiction of this Court arises under Sections 11-305 and 11-306 of the District of Columbia Code, under 28 U.S.C. Sections 2201, 2202 and 2282 and under 5 U.S.C. Section 1009. Jurisdiction is also based on the Fifth and Eighth Amendments to the Constitution of the United States.

4. Plaintiff was born on May 28, 1934 in Rimsting-am-Chiemsee, in Bavaria, in what is now the Federal Republic of Germany. She was at birth a national of Germany. She arrived in this country together with her family in April 1939, being then not quite five years of age.

5. Plaintiff became a citizen of the United States on December 4, 1950 and in 1951 a certificate of derivative citizenship was issued to plaintiff (Certificate No. A-218517), declaring that she had become a citizen of the United States on December 4, 1950.

6. Plaintiff lived in the United States continuously from 1939 to 1954. She attended grade school in Croton-on-the-Hudson, New York and high school in both Cornwall-on-Hudson, New York and Flushing, Queens, New York, graduating in June 1950. Thereafter she attended Smith College, Northampton, Massachusetts, graduating in June 1954, with the degree of Bachelor of Arts. From 1954 to 1955 she studied at the University of Bern, Switzerland on a scholarship given by the Institute for International Relations in New York, and from 1955 to April 1956 she was a full-time student at the Sorbonne in Paris. In April 1956 she returned to the United States residing in Nutley, New Jersey and took employment in New York City.

7. On June 6, 1956 the plaintiff left the United States arriving in Germany on June 12, 1959 for the purpose of

marrying Dr. Dieter Schneider, a German citizen and an attorney-at-law practicing in Cologne. The marriage took place in Cologne on July 4, 1956. Plaintiff has since lived continuously in West Germany with her husband except for one six-week trip for a family visit to the United States.

8. In Germany there were born to plaintiff and her husband two sons, one on June 21, 1957, and the other on November 6, 1958. Both of these sons were, at the time [fol. 3] of birth, and are now, citizens of the United States duly registered as such with the United States Consulate.

9. Plaintiff at all times at least from 1954 to June 1959 was in possession of a valid United States passport. This passport was amended after their births to include her two sons.

10. On or about August 21, 1959, the United States Consulate in Dusseldorf, which had possession of the United States passport issued to plaintiff and her two sons in connection with a request for extension of expiration date, deleted from it her name and crossed out her picture. The passport was returned to her as valid only in the names of her two infant sons aged respectively two and one years of age, but not for the plaintiff, their mother.

11. In September 1959, the plaintiff was requested by the American Consulate in Dusseldorf to surrender to that Consulate her Naturalization Certificate. She complied with this request under protest, the Naturalization Certificate being returned with a letter by her attorney specifically denying the Consulate's contention that she had forfeited her United States citizenship.

12. By letter dated November 25, 1959 from the United States Consulate General at Dusseldorf, plaintiff was notified that the Department of State on September 25, 1959 had decided that she had lost her American citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952 and she was served with a "Certificate of the Loss of the Nationality of the United States".

13. The actions of the United States Consulate described in paragraphs 10, 11 and 12 above were all taken pursuant

to the authority of the defendant, Christian A. Herter, and he has authorized, ratified, and ordered such actions.

14. The defendant, Christian A. Herter, is illegally denying the plaintiff her rights and privileges as a citizen of the United States. He has revoked her United States passport, taken away her Certificate of Naturalization, and issued to her a Certificate of the Loss of the Nationality of the United States, all in violation of the Constitution of the United States.

[fol. 4] 15. The illegal actions of the defendant heretofore described have caused and are causing the plaintiff to suffer irreparable injury. Said actions have prevented the plaintiff from enjoying diplomatic protection by the United States, from traveling under a United States passport, and have denied plantiff other privileges of American citizenship. Further, under German law, when the plaintiff's United States passport expired and was not renewed, she was and is as a stateless person in danger of being required to leave Germany and her husband. Plaintiff now has a temporary identification paper from the local authorities as a stateless person permitting her to remain in Germany for a limited time and with no assurance of extension.

16. The actions of defendant complained of herein purport to be based solely upon the authority of Section 352(a)(1) of the Immigration and Nationality Act of 1952. Such actions and the statute pursuant to which they purport to have been taken, are illegal and a deprivation of liberty and property without due process of the law, in violation of the Fifth Amendment of the Constitution of the United States because (1) they purport to expatriate a naturalized American citizen against her will solely because of three years' residence in the country of her origin, and (2) because they discriminate between native born and naturalized citizens. Such purported deprivation of citizenship also constitutes cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution.

17. Unless this Court grants the relief requested there exists no other adequate remedy for the irreparable injury to which plaintiff is being subjected.

Wherefore, plaintiff prays that:

(1) the Court issue a temporary restraining order, a preliminary injunction and a permanent injunction enjoining the defendant, his successors and subordinates, from carrying out or enforcing the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 or from denying the plaintiff any of the rights and privileges of a citizen of the United States or from withholding from the plaintiff a United States passport on the ground that she is not a citizen of the United States;

[fol. 5] (2) that the Court order the defendant to expunge from the records of the Department of State its ruling that the plaintiff is no longer a national of the United States, and to revoke and nullify the Certificate of the Loss of the Nationality of the United States, heretofore issued to the plaintiff;

(3) that the Court order defendant to return to plaintiff her Certificate of Naturalization;

(4) that the Court order defendant to issue to the plaintiff a United States passport;

(5) that the Court render a declaratory judgment that the plaintiff is a citizen of the United States and is entitled to all of the rights and privileges of a citizen of the United States;

(6) that the Court grant such further relief as may be just, lawful and equitable in the premises.

Milton V. Freeman, Charles A. Reich, 1229—19th Street, N.W., Washington 6, D.C., Horst Kurnik, 27 William Street, New York 5, New York.

Of counsel: Arnold, Fortas & Porter, 1229—19th Street, N.W., Washington 6, D. C.

Date: February 1, 1960

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed March 25, 1960

Comes now defendant by his attorney, the United States Attorney, and moves to dismiss the complaint on one or more of the following grounds: (1) The Court lacks jurisdiction over the person of the plaintiff; (2) The Court lacks jurisdiction over the subject matter; and (3) The plaintiff has failed to exhaust her administrative remedies under Section 360 of the Immigration and Nationality Act of 1952.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, Harold D. Rhynedance, Jr., Assistant United States Attorney.

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed April 2, 1960

Plaintiff Angelika L. Schneider, upon the pleadings herein and upon the attached affidavit of the plaintiff, moves the Court to grant summary judgment for the plaintiff, ordering, adjudging and decreeing as follows:

(1) that the defendant, his successors and subordinates be enjoined from carrying out or enforcing the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 or from denying the plaintiff any of the rights and privileges of a citizen of the United States or from withholding from the plaintiff a United States passport on the ground that she is not a citizen of the United States.

(2) that the defendant expunge from the records of the Department of State its ruling that the plaintiff is no longer a national of the United States, and revoke and

nullify the Certificate of the Loss of the Nationality of the United States, heretofore issued to the plaintiff;

[fol. 7] (3) that the defendant return to plaintiff her Certificate of Naturalization;

(4) that the defendant issue to the plaintiff a United States passport;

(5) that the plaintiff is declared to be a citizen of the United States and is entitled to all of the rights and privileges of a citizen of the United States.

This motion is made pursuant to Rule 56 (F.R.C.P.) on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Respectfully submitted,

Milton V. Freeman, Charles A. Reich, Horst Kurnik,
Attorneys for Plaintiff.

Of counsel: Arnold, Fortas & Porter, 1229 19th Street, N.W., Washington, D.C.

Date: April 2, 1960

AFFIDAVIT OF PLAINTIFF ANGELIKA L. SCHNEIDER

I, Angelika L. Schneider, being duly sworn, depose and say:

1. That I am the plaintiff in the above-entitled action.

2. That I am 25 years of age, a married woman living with my husband and two infant sons in a suburb of Cologne, Germany.

3. My husband is Dieter Schneider, a lawyer practicing in Cologne, Germany. He is a partner in the firm of Boden, Klonz, Oppenhoff, Andreae, Mathy and Schneider of Cologne.

4. I feel myself an American and I value my American citizenship highly. Practically all my relatives, except my

husband and children, live in the United States and are American citizens. These include two brothers, a half brother and sister.

[fol. 8] 5. I regard the United States as my country. I have had all my schooling (grade school, high school and college) in the United States except for some post-graduate work in Switzerland and France.

6. I am advised by the Department of State that I am no longer an American citizen and am not entitled to passport and nationality privileges as an American because I am married to a German citizen and living with him and our children in Germany where he resides and works. I am told that I have lost my citizenship because the country in which I live and in which my husband lives and works happens to be the one where I was born. I am also told that if I had married a resident of any other country and gone to live with him and raise children in the country where he lived and worked, I would not lose my American citizenship. Moreover, if I had been born rather than naturalized an American citizen I would also be able to conduct a normal family life with my husband in Germany. Instead, as a result of the action of the State Department in taking away my passport and my naturalization certificate, I am faced with a choice of giving up my husband and family life with him, or of being forced to give up my country. I do not wish to accept either alternative. I wish to be an American citizen which I feel myself to be and also to remain with my husband and our children in Germany where he practices his profession.

7. I have been able to acquire from the local authorities in Germany an identification paper as a stateless person

1961 A.L.S.

which expires in February ~~1960~~ and a temporary residence permit which may be withdrawn at any time. I hope that this arrangement can be extended until a decision of this case is reached, but I have no assurance that any extension can be given. The action in question places me in a position where I have no nationality. In addition, even if I could get an extension of my temporary permit and stateless persons identification paper, I am forbidden by that identification paper to travel as an American. Fur-

ther, I cannot go with my husband who is required to travel to various countries in Europe and to the United States, without obtaining first special visas which, as a stateless person, are very difficult to obtain; whereas as an Ameri- [fol. 9] can citizen I would not even need a visa in most countries, the passport being sufficient. But, more important, wherever I may be I can call on no government as my own to protect me.

8. I regard myself as an American. I have spent my entire childhood and youth in the United States and regard it as my country. From the time I was five until I came to Germany in 1956 to be married, I had been in Germany only briefly in 1954 and 1955 travelling through and have neither felt nor had any connection with that country. I have no political loyalty or allegiance to either Germany or any other country except the United States.

9. I was born in Rimsting-am-Chiemsee, Bavaria, in what is now Western Germany, on May 28, 1934. Before I was 5 years of age I was brought to the United States by my mother and father and lived there with them and my two brothers and my mother's two children by a previous marriage. We lived in Croton-on-Hudson and Cornwall-on-Hudson, New York, and I went to grammar school in Croton and attended high school in Cornwall and Flushing, New York. I graduated from Flushing High School in 1950.

10. I was naturalized derivatively on December 4, 1950 through the naturalization of my mother, and in 1951, was given a Certificate of Naturalization (Certificate No. A-218517), which certified to this fact. I do not have this certificate since I was required to surrender it to the State Department as I shall explain below.

11. In the fall of 1950 I entered Smith College, in Northampton, Massachusetts, and graduated in 1954. On graduation from Smith I accepted a scholarship at Bern University, Switzerland given to me by the Institute of International Education of New York City. I studied there for two semesters from the winter of 1954 through the summer of 1955. In the fall of 1955 I went to Paris and

enrolled at the Sorbonne as a full-time student for the winter term 1955-1956.

12. When I was preparing to leave for Switzerland in the fall of 1954 my uncle, Horst Kurnik, Esquire (my mother's brother) gave a farewell party for me at his home in Nutley, New Jersey. Shortly before that, my uncle had [fol. 10] met a young German lawyer, Dr. Dieter Schneider, who had come to New York on a Fulbright Research Scholarship and was working as a visiting trainee with an international trademark and patent firm in New York (Langer, Parry, Card & Langer) and studying at New York University Law School. My uncle invited him to the farewell party and this was where I first met my future husband.

13. I next saw him about a year later while passing through Cologne. Thereafter, while I was studying in Paris, in about February 1956, we became engaged. I went back to the United States in April. I lived in Nutley, New Jersey and took a job in New York City. I worked there until my fiance and I decided on a date for our marriage. I then left the United States in June 1956 for Germany. I arrived there June 12 and we were married in Cologne on July 4, 1956.

14. Except for a six-week trip to the United States in September and October 1957 to show my first-born to my relatives, I have not been back to the United States since 1956. I intend to live with my husband and to go with him wherever he may be. Since his law practice is in Cologne, it appears likely that he and I will remain there for the indefinite future, although I would hope to be able to go to the United States frequently.

15. We now have two sons, one Dieter Laurens, born June 21, 1957, and the other Marc Robert, born November 6, 1958. They were both registered, upon birth, at the United States Consulate in Dusseldorf.

16. I have been in possession of an American passport since September 7, 1954 and my sons were included in my last passport, both with their photographs and descrip-

tions. When I applied in August 1958, at the expiration of my most recent passport, for a new passport, I was not granted the normal two-year passport. Instead, the American Consulate in Dusseldorf issued me a passport limited until June 10, 1959, which was approximately the expiration date of a three-year period beginning with the date of my arrival in Germany for the purpose of marrying Dr. Schneider.

[fol. 11] 17. When, on June 9, 1959, I went to the United States Consulate in Dusseldorf and requested an extension, the extension was refused to me. It was later granted as to my children. This action was taken by crossing out my picture and my name in the passport, but leaving the pictures and the names of my children and granting them an extension of the passport. Under this passport, my infant sons may travel as American citizens but I am not able to accompany them as such.

18. As I understand it, under German law I was entitled to reside in Germany with my husband so long as I had a valid passport from any other country. When I lost my United States passport by the refusal of the American Consul to extend it, the local police asserted that German law required my expulsion and it was only after much discussion and difficulty that I was granted permission to stay for an interim period and issued an identification paper.

19. In September 1959 I was requested by the American Consulate in Dusseldorf to surrender to them the Naturalization Certificate which had been issued to me in 1951 certifying that I was naturalized in the United States as of December 4, 1950. The Naturalization Certificate was in the possession of my uncle, Horst Kurnik, Esquire, attorney at law, at 27 William Street, New York 5, New York, who, at my instruction, surrendered the Certificate under protest. A copy of his letter of September 22, 1959 to the United States Consulate General in Dusseldorf enclosing the Naturalization Certificate is attached as Exhibit A.

20. In August 1959, the American Vice Consul at Dusseldorf had prepared a Certificate of Loss of Nationality

in my case, and sent it to the State Department for approval. This approval was given by the State Department on September 25, 1959. By letter of November 25, 1959, a copy of this certificate was sent to me. I am attaching hereto as Exhibit B to this affidavit a copy of the letter of the American Consulate General dated November 25, 1959 and the enclosed Certificate of Loss of Nationality.

[fol. 12] 21. The letter of the American Consulate indicated that an appeal lay to the Board of Review on the Loss of Nationality in the State Department in Washington. Such an appeal was duly taken and by letter dated January 20, 1960, my counsel was advised that the Board had "affirmed the previous administrative decision" that I had "expatriated" myself. I am told that this action of the Board is the "final administrative determination" of the State Department and that I have no recourse except to this Court.

22. I understand that the statutes involved apparently require the results reached by the State Department. I cannot believe, however, that the Constitution of the United States permits me to be faced with the cruel choice of surrendering either my family or my country. I have, accordingly, directed the institution of the necessary proceedings to establish what I believe to be the true and just conclusion that I, although naturalized, have the same freedom as any American girl who received her citizenship by birth to marry where I please and to live with my husband and family without giving up my American citizenship.

Angelika L. Schneider

[Stamp:]

Germany
City of Dusseldorf
Consulate General
Of the United States
Of America

Subscribed and sworn to before me, Keith M. Heim, Vice Consul of the United States of America at Duesseldorf, Germany this 15th day of March, 1960.

Keith M. Heim, American Vice Consul, duly commissioned and qualified.

[SEAL]

Service No. 0866
Tariff Item No. 45
Fee Paid US $-(2.50)
Local Cy DM 10.50 PAID

[fol. 12a]

EXHIBIT A TO AFFIDAVIT

Registered Mail September 22, 1959

U. S. Consulate General
Cecilienallee
Duesseldorf
West Germany

Re: Angelika L. Schneider,
nee Schaeffer

Gentlemen:

At the request of my above client, I am enclosing herewith her original Naturalization Certificate, No. A-218517.

At the same time, I wish to point out to you that this surrender of her citizenship certificate to you shall not be construed as yielding to your Department's contention that she has forfeited her United States citizenship. It is, on the contrary, her contention that the facts underlying her residence in Germany fall within the exemption provisions of the Immigration and Naturalization Act (Public Law 414), respectively that so much of that law as differentiates between the natural born and naturalized citizen violates the Constitution of the United States.

Respectfully,

Horst Kurnik

HK/f
enclosure

[fol. 12b]

EXHIBIT B TO AFFIDAVIT

[GREAT SEAL OF THE U. S. A.]

221—SCHNEIDER, Angelica Liasse
TKO: gw

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

American Consulate General,
Duesseldorf, Germany,
5, Cecilien Allee,
November 25, 1959

Dear Mrs. Schneider:

Reference is made to * * * the Certificate of the Loss of the Nationality of the United States submitted in your case by this Consulate General to the Department of State, Washington, D. C.

The Department of State has confirmed your loss of American nationality under Section 352 (a) (1) of the Immigration and Nationality Act of 1952 * * * for having a continuous residence for three years in the territory of a foreign state of which she was formerly a national, i.e., in Germany, since June 12, 1956. A copy of the certificate is enclosed for your retention.

You are hereby notified that you have the privilege of appealing to the Board of Review of the Passport Office, Department of State, Washington, D. C., with regard to the decision that you have lost your American nationality. You should understand that the Board of Review must consider the case on the basis of the evidence which has previously been submitted or may subsequently be submitted and will be compelled to hold that you have lost your American nationality if such evidence brings your case within the law. If you think that the law has not been given sufficient weight, or if you wish to submit new or additional

evidence, you may present the appeal. The appeal may be made through a foreign service office or through a relative, friend or attorney in the United States. No formal application for reconsideration need be made but a statement should be submitted preferably under oath giving the grounds of appeal and should be supported by such documentary evidence as may be available.

Very truly yours,

For the Consul General:

/s/ THEODORE K. OSGOOD
American Vice Consul

Registered.
Encl.: Cert. of Loss.

Mrs. Angelica Liasse Schneider,
20 Baadenbergerstr.,
Koeln-Ehrenfeld.

[fol. 12c]

Foreign Service of the United States of America

CERTIFICATE OF THE LOSS OF THE NATIONALITY OF THE UNITED STATES

(This form has been prescribed by the Secretary of State pursuant to Section 301 of the Act of October 14, 1940; 54 Stat. 1171 and Section 358 of the Act of June 27, 1952, 66 Stat. 272)

Consulate General of the United States of)
) ss.:
America at Duesseldorf, Germany)

I, Leon PUKACH, hereby certify that, to the best of my knowledge and belief, Angelica Liasse SCHNEIDER nee Schaeffer was born at Rimsting Germany, on May 28, 1934:
(Town or city) (State or country) (Date)

That she resides at 20 Baadenbergerstrasse, Koeln-
(Street) (City)
Ehrenfeld, Germany;
(State)

That she last resided in the United States at 309 Grant
(Street)
Avenue, Nutley 10, New Jersey;
(City) (State)

That she left the United States on June 6, 1956;
(Precise date should be given)

That she acquired the nationality of the United States by virtue of naturalization before the U.S. District Court, in New York City, on December 4, 1950.
If a national by birth in the United States, so state; if naturalized, give the name and place of the court in the United States before which naturalization was granted and the date of such naturalization

her on June 12, 1959.

That she has expatriated ~~himself~~ under the provisions of Section 352 (a)(1) ~~of Chapter IV of the Nationality Act of 1940~~[1] Chapter 3 of Title III of the Immigration and Nationality Act of 1952[1] by having a continuous residence for three years in the territory of a foreign state of which she was formerly a national, i.e., in Germany, since June 12, 1956.
(The action causing expatriation should be set forth succintly)

That the evidence of such action consists of the following: Mrs. Schneider's statement that she arrived in Germany on June 12, 1956, and her presence at this office on August 14, 1959.
(Here list the sources of information and such documentary evidence as may be available concerning the action causing expatriation of the individual concerned)

In testimony whereof, I have hereunto subscribed my name and affixed my office seal this 26th day of August,
(Month)
1959.

[SEAL]

/s/ Leon Pukach
Leon (Signature) Pukach
Vice Consul
(Title of officer)

Approved by the Department of State on September 25, 1959.

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[1] Strike out whichever is inapplicable.

[fol 13]

IN THE UNITED STATES DISTRICT COURT

APPLICATION FOR CONVENING OF A THREE JUDGE COURT—Filed April 15, 1960

Plaintiff applies pursuant to Sections 2282 and 2284 of the United States Judicial Code for the convening of a three judge court to hear the above-entitled matter.

As reason therefor plaintiff states that the Complaint herein filed prays for an injunction restraining the enforcement, operation and execution of Section 352(a)(1) of the Immigration and Nationality Act of 1952, an Act of Congress, for repugnance to the Fifth and Eighth Amendments to the Constitution of the United States. Plaintiff has also filed a Motion for Summary Judgment requesting inter alia the issuance of an injunction in the terms prayed for in the Complaint.

Examination of the papers, we believe, will indicate the substantial nature of the question involved.

Respectfully submitted,

Milton V. Freeman, Charles A. Reich, Horst Kurnik.

Of Counsel: Arnold, Fortas & Porter, 1229—19th St., N.W., Washington 6, D.C.

Dated: April 15, 1960

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT

OPPOSITION TO PLAINTIFF'S APPLICATION FOR CONVENING A THREE-JUDGE COURT—Filed April 15, 1960

Comes now defendant by his attorney, the United States Attorney, and opposes plaintiff's application for convening a three-judge court pursuant to 28 USC §§2282 and 2284.

Defendant opposes the application on the following grounds: First, the Court is without jurisdiction to entertain this suit and thus the complaint is subject to dismissal

at the outset by the single District Judge to whom the case is first assigned. In support of this ground, defendant [fol. 14] hereby incorporates herein by reference his previously filed Motion to Dismiss, together with the supporting memorandum of points and authorities, which is now awaiting consideration and determination.

Second, if the Court has jurisdiction to entertain this suit, plaintiff has failed to present a substantial constitutional question as might warrant the convening of a three-judge court. Defendant believes that plaintiff's contentions to the contrary are not supported by the authorities upon which she relies in her recently filed Motion For Summary Judgment.

For the Court's information, defendant intends to oppose plaintiff's Motion For Summary Judgment and to file a cross-motion if the Court denies his Motion To Dismiss or grants plaintiff's application. Plaintiff's counsel has assured counsel for defendant that, after determination of the pending application and motion to dismiss, a short but reasonable period of time would be afforded by stipulation or otherwise to oppose plaintiff's motion and to file a cross-motion for summary judgment.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, Harold D. Rhynedance, Jr., Assistant United States Attorney.

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS, GRANTING MOTION TO CONSOLIDATE AND DENYING MOTION TO CONVENE THREE-JUDGE COURT—July 19, 1960

Upon consideration of defendant's motion to dismiss in each of the above entitled actions, of defendant's motion in each of the above entitled actions to consolidate said actions

and one other action, and of the application of plaintiff in each of the above entitled actions to convene a three-judge court, and a full and fair hearing having been afforded the parties hereto as to said motions and applications, and it [fol. 15] appearing to the Court that the above entitled actions should not be dismissed but that no substantial constitutional question is presented in said actions, it is by the Court this 19th day of July 1960:

Ordered that defendant's motion to dismiss in Civil Action No. 324-60 and in Civil Action No. 777-60 be and the same are hereby denied (*Perkins* v. *Elg*, 69 App. D.C. 175; 99 F. 2d 408, affirmed 307 U.S. 325. *Frank* v. *Rogers*, 102 U.S. App. D.C. 367, 253 F. 2d 889. Rule 57 Federal Rules of Civil Procedure) and it is further

Ordered that defendant's motion in Civil Action No. 324-60 and in Civil Action No. 777-60 to consolidate be and the same are hereby granted except as to *Cort* v. *Herter*, Civil Action No. 868-60, and it is further

Ordered that the applications of plaintiffs Angelika L. Schneider and Anne d'Arbeloff Guerrieri to convene a three-judge court be and the same are hereby denied (*Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F. 2d 619, cert. den. 338 U.S. 860, reh. den. 338 U.S. 888; *Luria* v. *U.S.*, 231 U.S. 9; *Mackenzie* v. *Hare*, 239 U.S. 299; *Perez* v. *Brownell*, 356 U.S. 44).

Burnita Shelton Matthews, Judge.

In the United States District Court

Answer—Filed July 29, 1960

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, defendant avers as follows:

1. Defendant admits the allegations contained in paragraph 1 of the complaint, except insofar as he denies that plaintiff is now a naturalized citizen of the United States.

[fol. 16] 2. Defendant admits the allegations contained in paragraph 2 of the complaint.

3. Defendant denies the allegations contained in paragraph 3 of the compalint.

4 and 5. Answering the allegations contained in paragraphs 4 and 5 of the complaint, defendant admits the following: Plaintiff, as Angelica Liasse Shaeffer, was born of German parents on May 28, 1934 at Rimsting, Bavaria, Germany, in what is now a part of the Federal Republic of Germany. Plaintiff came to the United States in 1940 and resided here until September 1954. Her mother was naturalized as a citizen of the United States in 1946 and her father was naturalized as a citizen of the United States on December 4, 1950, at which time plaintiff also acquired the status of a naturalized citizen of the United States under the provisions of Section 314(a) of the Nationality Act of 1940. In 1951 a certificate of derivative citizenship (Certificate No. A-218517) was issued to plaintiff, declaring that she had become a citizen of the United States on December 4, 1950.

6. Defendant admits the allegations contained in paragraph 6 of the complaint.

7. Answering the allegations contained in paragraph 7 of the complaint (as corrected and amended by the stipulation entered into and submitted to this Court by counsel for the respective parties on or about February 10, 1960), defendant admits as follows: Plaintiff, on June 6, 1956, left the United States and arrived in the Federal Republic of Germany on June 12, 1956, for the purpose of marrying Dr. Dieter Schneider, a German citizen and an attorney-at-law practicing in Cologne, Federal Republic of Germany. Plaintiff married her present husband, the said Dr. Schneider, in Cologne on July 4, 1956. Plaintiff has resided continuously in the Federal Republic of Germany since June 12, 1956 and has not returned to the United States during such period, except for one trip to the United States of about six weeks duration for the purpose of visiting her

family. It is averred that plaintiff intends to continue residing in the Federal Republic of Germany with her [fol. 17] husband and children so long as her husband remains there and that she has no definite intention to return to the United States to reside.

8. Answering the allegations contained in paragraph 8 of the complaint, defendant admits as follows: In the Federal Republic of Germany there was born to plaintiff and her husband two sons, one on June 21, 1957, and the other on November 6, 1958. Both children acquired United States citizenship at birth under the provisions of Section 301(a)(7) of the Immigration and Nationality Act of 1952, and have been duly registered as United States citizens with a United States Consulate in the Federal Republic of Germany. It is averred that the two children, notwithstanding their United States citizenship, have also acquired German nationality by reason of their birth through the said German citizen father.

9. Answering the allegations contained in paragraph 9 of the complaint, defendant admits as follows: Plaintiff, as Angelica L. Shaeffer, was issued on September 7, 1954 United States Passport No. 468672. She was registered as a national of the United States residing abroad on October 26, 1954, by the United States Consulate at Bern, Switzerland. On June 21, 1956, Passport No. 468672 was renewed by the United States Consulate at Dusseldorf, Germany. On August 20, 1957, the passport was amended by the United States Consulate at Dusseldorf, Germany, to read in her married name, Angelica Schneider, and to include the sole child then born to her. On August 28, 1958, plaintiff was issued a new United States Passport, No. 296, which was valid only to June 11, 1959. On June 10, 1959, plaintiff executed an application for the extension of her registration and Passport No. 296 to August 28, 1960. Such application was referred by the United States Consulate at Dusseldorf, Germany, to the Department of State for consideration and decision. The requested extension was denied by the Department of State on the basis that she was considered to have expatriated herself under the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 unless she could establish that her case came within one

of the exemptions provided in Section 353 of that Act. [fol. 18] Thereafter, plaintiff, together with one of her present counsel, visited the United States Consulate at Dusseldorf, Germany, on August 14, 1958, for the purpose of clarifying her citizenship status. At that time, plaintiff and her counsel did not contest the fact that she had lost her citizenship under the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 or that she was unable to establish that her case came within one of the exemptions specified in Section 353 of that Act. The birth of the second of the two aforesaid children was reported on that occasion to the said Consulate.

10. Answering the allegations contained in paragraph 10 of the complaint, defendant admits as follows: On or shortly prior to August 21, 1959, the United States Consulate in Dusseldorf, which had possession of the United States passport issued to plaintiff in connection with the aforesaid request for extension of the expiration date, deleted from such passport her name and crossed out her picture but did not do so with respect to the name or picture of her first born child. The passport, which was amended to exclude her but to include both of her two said children, was returned to her as valid only in the names of such children.

11. Answering the allegations contained in paragraph 11 of the complaint, defendant admits as follows: On August 26, 1959, a United States Consular Officer at Dusseldorf certified that plaintiff expatriated herself under the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 by having a continuous residence for three years in the territory of a foreign state of which she was formerly a national, i.e., in Germany, since June 12, 1956. Such certification was approved by the Department of State on September 25, 1959. Plaintiff in September 1959 was requested by the United States Consulate in Dusseldorf to surrender to that Consulate her Naturalization Certificate. Plaintiff complied with this request under protest, the Naturalization Certificate being returned with a letter by her attorney specifically denying the Consulate's contention that she had forfeited her United States citizenship.

12. Answering the allegations contained in paragraph 12 of the complaint, defendant admits as follows: The United [fol. 19] States Consulate at Dusseldorf was advised of the aforesaid approval by the Department of State of the above-described certification by the Consulate respecting plaintiff's expatriation under Section 352(a)(1) of the Immigration and Nationality Act of 1952. Thereafter, by letter dated November 25, 1959 from the United States Consulate General at Dusseldorf, plaintiff was notified that the Department of State on September 25, 1959, had decided that she had lost her United States citizenship pursuant to Section 352(a)(1) of the foregoing Act, and she was served with a "Certificate of the Loss of the Nationality of the United States."

13. Defendant admits that the actions described in the allegations contained in paragraphs 10, 11 and 12 of the complaint to the extent they have been admitted in this answer were all taken pursuant to the authority of defendant, and he has authorized, ratified, and ordered such actions. Further answering, defendant avers as follows: By letter dated January 5, 1960, plaintiff through counsel appealed to the Board of Review On The Loss of Nationality, Passport Office of the Department of State, from the aforesaid decision of the said Department that she had expatriated herself on June 12, 1959 under Section 352(a)(1) of the Immigration and Nationality Act of 1952. Upon review and consideration, the said Board of Review On The Loss of Nationality affirmed such previous decision and, on January 20, 1960, advised plaintiff through her counsel in writing to this effect. It is further averred that plaintiff's first name, while spelled as "Angelika" in the complaint, is shown as "Angelica" in official records of the Department of State, including certain documents signed by her.

14. Defendant denies the allegations contained in paragraph 14 of the complaint, except insofar as he admits that he has caused plaintiff's United States passport to be revoked, her Certificate of Naturalization to be taken away from her, and a Certificate of the Loss of the Nationality of the United States to be issued to her.

15. Answering the allegations contained in paragraph 15 of the complaint, defendant avers as follows: The allegations contained in the first and second sentences of such paragraph are denied, except insofar as it is admitted that plaintiff no longer is entitled to the diplomatic [fol. 20] protection of the United States, to travel under a United States passport, and to enjoy certain other privileges of United States citizenship. Further answering, defendant is not required to answer the allegations contained in the third and fourth sentences of the said paragraph of the complaint since they are irrelevant and immaterial but, if an answer be required, defendant avers that he is without knowledge or information sufficient to form a belief as to the truth of such allegations.

16. Answering the allegations contained in paragraph 16 of the complaint, defendant avers as follows: As respects the allegations contained in the first sentence of such paragraph it is admitted that the actions of defendant complained of in the complaint are based solely upon the authority specified in Section 352(a)(1) of the Immigration and Nationality Act of 1952. Further answering, defendant is not required to answer the remaining allegations of such paragraph as they are conclusions of law but, if an answer be required, they are denied.

17. Defendant denies the allegations contained in paragraph 17 of the complaint. The remaining allegations of the complaint are denied.

Third Defense

The complaint should be dismissed for the reason that the Court lacks jurisdiction over the person of the plaintiff.

Fourth Defense

The complaint should be dismissed for the reason that the Court lacks jurisdiction over the subject matter.

Fifth Defense

The complaint should be dismissed for the reason that plaintiff has failed to exhaust her administrative remedies

under Section 360 of the Immigration and Nationality Act of 1952.

Sixth Defense

Even assuming arguendo that the administrative remedies available to plaintiff under Section 360 of the Immigration and Nationality Act of 1952 are not exclusive, they are the specified remedies which in the circumstances of the instant case must first be exhausted by plaintiff before the Court may obtain jurisdiction over the person of [fol. 21] the plaintiff and the subject matter. The complaint fails to reflect any basis upon which plaintiff's failure to exhaust the specified remedies provided by Section 360 of the Immigration and Nationality Act of 1952 may be excused. Hence, the complaint should be dismissed by reason of plaintiff's failure to exhaust such remedies.

Seventh Defense

The complaint fails to raise a substantial constitutional question.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, Harold D. Rhynedance, Jr., Assistant United States Attorney.

[Certificate of Service]

In the United States District Court

Affidavit of Horst Kurnik in Support of Plaintiffs Motion for Summary Judgment—Filed August 9, 1960

State of New York)
County of New York) ss.:

Horst Kurnik being duly sworn deposes and says:

1) I am one of the attorneys for plaintiff in the above entitled action.

2) I am making this affidavit with reference to some of the allegations set forth in 9th of defendant's Answer served on July 29, 1960.

3) In that Nr. 9 of his Answer defendant alleges as follows:

> "Thereafter, plaintiff, together with one of her present counsel, visited the United States Consulate at Dusseldorf, Germany, on August 14, 1958, for the purpose of clarifying her citizenship status. At that time, plaintiff and her counsel did not contest the fact that she had lost her citizenship under the provision of Sec. [fol. 22] 352(a)(1) of the Immigration and Nationality Act of 1952 or that she was unable to establish that her case came within one of the exemptions specified in Sec. 353 of that act."

4) My records reveal that I visited together with the plaintiff the United States Consulate at Duesseldorf on August 14, 1959 (and not 1958 as alleged in the Answer). At that time plaintiff had come to the office at the request of the U.S. Consul.

5) When we appeared before the consul the official in charge indicated that her passport had to be cancelled. He also urged plaintiff to sign a statement setting forth all the facts which he did not explain to me or her.

6) My immediate reply was that I was advising plaintiff not to sign any written statements or to make any oral statements whatsoever and thereupon plaintiff refused to make any statements.

7) At the same time I protested the forfeiture of plaintiff's citizenship as being illegal under the Immigration and Nationality Act of 1952 and the U.S. Constitution and I indicated that in the event her passport would be cancelled and her citizenship would be considered forfeited appropriate actions would be inaugurated in order to contest such action by Defendant or his agents.

8) Subsequently plaintiff was requested by the U.S. Consul in Duesseldorf to surrender her Naturalization Certificate. This was done by me under protest as is specifically admitted in the last sentence of paragraph 11 of the Answer filed by defendant herein. My letter of

protest is attached to plaintiff's affidavit already filed in support of this motion.

9) Accordingly the allegation that "Plaintiff and her counsel did not contest the fact that she had lost her citizenship" is not in accordance with the facts.

Horst Kurnik

[Jurat dated August 5, 1960]

[fol. 23] [Filed August 11, 1960]

Defendant's Motion for Judgment on the Pleadings

Comes now defendant by his attorney, the United States Attorney, and moves for judgment on the pleadings for the reason that on the pleadings defendant is entitled to judgment as a matter of law.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, Harold D. Rhynedance, Jr., Assistant United States Attorney.

[Certificate of Service]

In the United States District Court

Opposition to Motion for Judgment on the Pleadings—Filed August 15, 1960

1. Plaintiff opposes the motion for judgment on the pleadings and requests the Court to consider the affidavits of Angelika L. Schneider and Horst Kurnik filed herein not only as affidavits in support of plaintiff's motion for summary judgment but also in opposition to defendant's motion for judgment on the pleadings.

2. The grounds for opposition as a matter of law to the defendant's motion for judgment on the pleadings are

the same reasons advanced as a matter of law in support of plaintiff's own motion for summary judgment.

Respectfully submitted,

Milton V. Freeman, 1229—19th Street, N.W., Washington 6, D. C., Horst Kurnik, 37 William Street, New York 5, New York.

Of counsel: Arnold, Fortas & Porter, 1229—19th Street, N.W., Washington 6, D.C.

Date: August 15, 1960

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

ORDER AND JUDGMENT—August 17, 1960

Plaintiff having moved for summary judgment and defendant having moved for judgment on the pleadings, and the Court having considered the complaint, the answer and the affidavits filed herein as well as the previous proceedings herein, and being fully advised in the premises, and being advised of the order entered in this matter on July 19, 1960 by Judge Matthews, holding that no substantial constitutional question is presented by said complaint, and the Court being of the opinion that Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States,

It is hereby

Ordered, Adjudged and Decreed:

1. That the plaintiff's motion for summary judgment be and it is hereby denied, and

2. That judgment on the pleadings be and it is hereby entered for defendant, and the complaint be and it is hereby dismissed.

George L. Hart, Jr., Judge.

Date: August 17, 1960

No objection as to form:

Milton V. Freeman, Counsel for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 17, 1960

Notice is hereby given that Angelika L. Schneider, the plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order and Judgment entered in this action on August 17, 1960.

Respectfully submitted,

Milton V. Freeman, Horst Kurnik,

Of Counsel:

Date: August 17, 1960

[fol. 25]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,959—September Term, 1961

ANGELIKA L. SCHNEIDER, Appellant,

v.

DEAN RUSK, individually and as Secretary of State, Appellee.

No. 16,002—September Term, 1961

DEAN RUSK, Secretary of State, Appellant,

v.

ANGELIKA L. SCHNEIDER, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Burger, Circuit Judges.

JUDGMENT—May 11, 1962

These appeals came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this court

(1) that in No. 15,959 the judgment of the District Court for the defendant on the pleadings and dismissing the complaint is hereby affirmed on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F. 2d 619 (1949).

(2) that the appeal in No. 16,002 from the order of the District Court denying defendant's motion to dismiss the complaint is dismissed for the reason that the order is not appealable. *Catlin* v. *United States*, 324 U.S. 229, 236.

Per Curiam.

Dated: May 11, 1962

[fol. 28] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 29]

SUPREME COURT OF THE UNITED STATES

No. 251—October Term, 1962

ANGELIKA L. SCHNEIDER, Petitioner,

vs.

DEAN RUSK, etc.

ORDER ALLOWING CERTIORARI—Filed October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 231

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Attorneys for
Angelika L. Schneider

July 13, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Angelika L. Schneider, petitioner herein, by her attorneys, prays that a writ of certiorari issue to the Court of Appeals to review the decision of that Court in this case.

OPINIONS BELOW

No opinions were issued by the courts below. The District Court without an opinion entered an Order and Judgment on August 17, 1960 (Appendix A) granting respondent's motion for judgment on the

pleading and dismissing the complaint. The United States Court of Appeals for the District of Columbia Circuit issued a judgement on May 11, 1962 (Appendix B) affirming the judgment of the District Court on the authority of a prior decision of that Court, *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir. 1949). The majority and dissenting opinions in *Lapides* v. *Clark* are set forth in Appendix C.

JURISDICTION

Petitioner brought this action for Declaratory Judgment in the District Court pursuant to Section 11-306 and 11-306 of the District of Columbia Code, 28 U.S.C. § 2201, 2202, 2282 and 5 U.S.C. § 1009. A similar procedure was recently sustained by this Court in *Rusk* v. *Cort*, —— U.S. ——. (April 2, 1962)

Final Judgment adverse to petitioner was entered by the District Court August 17, 1960 and a timely appeal followed. The Court of Appeals on May 11, 1962 entered a judgment affirming the order of the District Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived petitioner of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby

discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the petitioner.

STATUTE INVOLVED

Section 352(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

Loss of nationality by naturalized national

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

STATEMENT OF THE CASE

Petitioner was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (J.A. 2, 9, 16).

Petitioner lived in the United States continuously from 1939 to 1959—from the age of five to the age of twenty. She received all of her schooling in this country and was graduated from Smith College in 1954. Thereafter, on a scholarship given by the Institute of International Relations in New York, she studied for a year in Switzerland and then continued studying for a year in Paris. She returned to the United States in April 1956 (J.A. 2, 9-10, 16).

On June 6, 1956, petitioner left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom petitioner had become engaged while studying in Paris. Since that time, petitioner lived continuously with her husband in the Federal Republic of Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957 (J.A. 2, 10, 16).

The two sons born to petitioner, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (J.A. 2-3, 10, 17).

During all the time of her residence in Germany until June 1959, petitioner was in possession of a valid United States passport. In June 1959 however, the United States Consulate in Dusseldorf refused to grant petitioner an extension of her passport contending that petitioner had lost her United States citizenship. In September 1959, petitioner was requested by the American Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, petitioner was served with a "Certificate of Loss of Nationality of the United States" J.A. 3, 10-11, 17-19).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed, by letter of January 20, 1960, the previous administrative decision that petitioner had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving petitioner without further administrative remedy. Pursuant to this ruling petitioner is now being denied all rights and privileges of United States citizenship, including a United States passport (J.A. 12, 19).

Petitioner is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (J.A. 4, 8-9). Petitioner feels herself to be an American and insists on her status as an American citizen (J.A. 8). She is not a German citizen, nor a citizen of any other country (J.A. 8). She is residing in Germany only because that is where her husband lives and practices his profession (J.A. 10).

PRIOR PROCEEDINGS

On February 1, 1960, petitioner filed a complaint in the District Court for the District of Columbia alleging that Section 352, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States, and seeking a declaration that petitioner is a citizen of the United States as well as certain other relief.

On August 17, 1960 the District Court entered an Order and Judgment (Appendix A) denying petitioner's motion for summary judgment and granting

respondent's motion for judgment on the pleadings, and dismissing the complaint. The Order and Judgment of the District Court recited that "Section 352 (a) (1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States."

Petitioner took a timely appeal to the United States Court of Appeals for the District of Columbia Circuit.

On March 24, 1961, after the case had been fully briefed and oral argument held, the Court of Appeals *sua sponte* postponed its decision in this matter pending decision by this Court of *Herter* v. *Cort*, No. 567, October Term 1960, (*Rusk* v. *Cort*, No. 20, October Term 1961), because, as it now appears, the similarity of the jurisdictional issue involved. On April 25, 1962 the Court of Appeals denied a motion by petitioner asking the Court either to decide the case promptly or to certify the matter to this Court.

Petitioner, thereupon, on May 12, 1961, filed a petition for a writ of certiorari asking this Court to review this case *prior to judgment in the Court of Appeals.* The writ was denied on June 20, 1961, No. 963, October Term, 1960.

On May 11, 1962 after this Court had upheld the right of the respondent in *Rusk* v. *Cort* to challenge by declaratory judgment the denial of his United States citizenship while residing abroad, the Court of Appeals entered an order (Appendix B) affirming the judgment of the District Court dismissing the petitioner's complaint on the merits "on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F.2d 619 (1949)."

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important constitutional issue directly affecting the rights of naturalized citizens to travel and reside abroad. Ultimately the case involves not only the power of Congress to restrict in general terms the residence abroad of American citizens, but also the status of naturalized citizens as equal to the native-born under the Constitution.

This case challenges the constitutionality of Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for three years in the country of his origin shall *automatically* lose his American citizenship. No similar provision applies to the native-born.

The issue here is one with which this Court has recently been much concerned—the scope of Congressional power to attach to certain conduct the withdrawal of American citizenship. See *Perez* v. *Brownell*, 356 U.S. 44 (1958); *Trop* v. *Dulles*, 356 U.S. 86 (1958) and two cases now pending before this Court, *Rusk* v. *Cort*, No. 3, Oct. Term 1962 and *Kennedy* v. *Mendoza-Martinez*, No. 2, Oct. Term 1962.

More specifically, the issues presented in this case are (1) whether Congress can discriminate between native-born and naturalized citizens in attaching the consequence of loss of citizenship to the residence abroad of naturalized citizens for stated periods of time, while imposing no similar restrictions on the native-born; and (2) whether Congress, under its foreign affairs powers, can attach loss of citizenship to conduct—such as mere residence abroad—which is completely consistent with continued allegiance to the United States.

1. The Questions Are Important

A. This case is highly significant because it involves the *first* and *only* substantive discrimination between native-born and naturalized citizens that Congress has ever attempted. Section 352 is new. It first became part of our law with the passage of the Nationality Act of 1940.[1] It is the single substantive exception to the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the Presidency of the United States to the native-born.) See *Luria* v. *United States*, 231 U.S. 9 (1913); *United States* v. *MacIntosh*, 283 U.S. 605-624 (1931); *Knauer* v. *United States*, 328 U.S. 654, 658 (1946). See also *Osborn* v. *The Bank of the United States*, 22 U.S. 738, 827-828 (1824).

If this section is allowed to stand, it will mark the first step in making naturalized citizens second-class citizens.

The challenged legislation is an assertion by Congress of the power to regulate the travel and residence abroad

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[1] Prior to that time, the Act of March 2, 1907, 34 Stat. 1228, had made a distinction between native-born and naturalized citizens, but this was procedural and not a substantive one. The 1907 Act established a rebuttable presumption that a naturalized citizen who returned to the country of his origin for a period of two years had voluntarily abandoned his American citizenship. This presumption ceased upon the return of a citizen to the United States. 28 Op. Atty. Gen. 504 (1910). It was "easy to preclude, and easy to overcome." *United States* v. *Gay*, 263 U.S. 353, 358. It imposed upon the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not, as does the present law, automatically deprive American citizens of their citizenship on grounds of mere residence abroad independly of their wishes.

of naturalized citizens, while leaving native-born citizens free to travel and reside as they please. It is in substance a claim of right on the part of Congress to say to naturalized citizens that they have no right to travel and remain outside the borders of the United States except under terms and conditions which Congress, as a matter of grace, may allow, while no such limitation is made on their fellow citizens who owe their citizenship to birth.

B. This case presents issues similar to those raised in *Perez, Trop, Cort* and *Mendoza* and is of parallel consequence. The issues presented in this case are related with those raised in *Cort* and *Mendoza* in that in each case a statute providing for the withdrawal of citizenship is sought to be justified as a proper exercise of Congress' foreign affairs power.[2] This case should be considered together with *Cort* and *Mendoza*.

C. Unlike *Cort* and *Mendoza*, which involves relatively few citizens, this case is one which directly affects the right of a great number of citizens who acquired their citizenship through naturalization. Although it is not possible to determine how many persons' status may be directly affected by the possible ap-

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[2] In *Cort* and *Mendoza*, it is Section 401(j) of the Nationality Act of 1940, 54 Stat. 1168, now Section 349(a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(10) which provides for the denaturalization of persons who leave the United States in order to avoid the draft. In *Cort* and *Mendoza*, as well as here, the Government argues that Congress under its foreign affairs power may provide for the termination of the citizenship of persons coming within the terms of these respective provisions because their residence abroad as United States citizens is likely to result in complications or frictions with other countries.

plication of Section 352, it is unquestionally a large number. The following figures are available:

There are at present over 670,000 Americans, excluding military personnel, who reside in foreign countries throughout much of the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 857,000 United States passports issued during the year 1961, some 105,000 were issued to naturalized citizens.[3]

2. The Questions Have Not Been Resolved By This Court

These questions, we submit, have never been ruled on by this Court.

(a) The question whether any substantive discrimination between naturalized and native-born citizens is permissible by our Constitution has never been resolved by this Court. As noted above, Section 352 represents the first attempt by Congress to impose such a discrimination, and its constitutionality has never been passed upon by this Court.

(b) The question whether Congress, under its foreign affairs power, can attach loss of citizenship to an act which is completely consistent with continued allegiance to the United States—such as residence abroad—was left unresolved in this Court's decision in *Perez* v. *Brownell, supra.* There this Court in upholding the constitutionality of withdrawing the citizenship of those who voted in foreign elections noted (356 U.S. at 60):

> ". . . Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something

[3] Information obtained from State Department Passport Office.

> less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."

3. The Section Is Prima Facie Invalid

A. Section 352 of the Immigration and Nationality Act applies only to a naturalized citizen. There is no restriction on the right of the native-born citizen to travel or reside abroad as long or for whatever legitimate purpose they desire. As noted above, this section would mark the *first* and *only* substantive discrimination between native-born and naturalized citizens. It is a deviation from long established principle that native-born and naturalized citizens are equal under the law and that Congress may not abridge these rights. See for example, *Luria* v. *United States, supra, Osborn* v. *The National Bank of the United States, supra.* See also dissenting opinion of Mr. Chief Justice Warren in *Perez* v. *Brownell, supra* at 66 where it is stated that:

> ". . . Of course, naturalization unlawfully procured may be set aside. But apart from this circumstance, the status of the naturalized citizen is secure."

B. The Section cannot be justified as an attempt to deal with the problem of citizenship fraudulently obtained or with no bona fide intention to remain. The three year period of foreign residence is an absolute bar without relation to time or circumstances. It operates no matter how long after the naturalization foreign residence is taken up or how unforeseen the reasons for the foreign residence.

In this respect, it is unlike Section 340(d) of the Act, 8 U.S.C. § 1451(d), a predecessor of which

was sustained by this Court in *Luria* v. *United States*, 231 U.S. 9 (1913), which provides that return within 5 years of naturalization to the country of origin creates a rebuttable presumption that the citizenship was not acquired in good faith.[4]

Section 352(a)(1) is applicable independently of the good faith of the naturalization, and whether it took place six months or twenty years previously. The present case presents a clear example. The Government has not suggested, nor could it suggest, any question of good faith in petitioner's naturalization. For it is plain that when Angelika Schneider (née Schaeffer) became naturalized in 1950 at the age of 16, having resided in the United States since 1939, that she could not possibly have known or suspected that she would, years later, meet Dieter Schneider and marry him. Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as an attack on the original naturalization, it would be arbitrary. *Cf. Tot* v. *United States*, 319 U.S. 463 (1943); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

C. Under *Perez* "the means—in this case withdrawal of citizenship—must be reasonably related to the end—here, the regulation of foreign affairs." 356 U.S. 44 at 58.

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[4] In *Luria* this Court stated, 231 U.S. at 27:

> "* * * But we are of the opinion as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to acquire but slight countervailing evidence to overcome it . . . . So construed we think the provision is not an excess of the power of Congress."

Section 352(a) is broad and general in its terms. The means are not reasonably related to the end. Rather, the Section applies a broad removal of citizenship without regard to necessity or justification. The Section limits the right of naturalized citizens to reside abroad not only in specific areas or under specific circumstances in which the residence abroad of American citizens might be likely to complicate our relations with foreign governments. Indeed it applies to all cases, including those where, as here, residence abroad is plainly not likely to cause frictions with a foreign government. Persons and conduct likely to embarrass the United States in its relations with other governments are dealt with specifically in other sections of the Act. So, for example, special problems arising out of dual nationality are treated in Section 350 of the Act, 8 U.S.C. § 1482. Specific conduct likely to embroil the United States in conflict with foreign governments, such as American citizens voting in foreign elections, serving in foreign armies, or accepting public office in a foreign country, is dealt with in Section 349 of the Act, 8 U.S.C. § 1481, under which such acts are made expatriating.

Section 352 is an assertion by Congress of the power to limit the right of travel and live abroad, not only to specific areas where the residence abroad of American citizens is likely to cause problems, but to all parts of the world irrespective of whether any foreign affairs problem is likely to result.

D. In any event there is a serious constitutional question whether Section 352 would not violate the Fifth Amendment because it appears to proceed from a point of view that naturalized citizens as a class are not quite as loyal or reliable as the native-born. Classification of citizens on the basis of birth is foreign to our system

of law and suspect even when justified by the most extreme wartime emergencies. *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). See also Judge Edgerton's dissenting opinion in the case which was the basis of the decision by the Court below here, *Lapides* v. *Clark*, 176 F.2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 360 (1949).[5]

E. Furthermore, there is an important constitutional question as to whether Section 352 is penal in nature and therefore a cruel and unusual punishment in violation of the Eighth Amendment of the Constitution as was the provision in *Trop* v. *Dulles*, *supra*. This is particularly true since the act of residence abroad is an innocent one not one subject to condemnation as criminal. *Cf. Robinson* v. *California* No. 554, Oct. Term 1961, —— U.S. ——, June 25, 1952.

[5] While Judge Edgerton's dissent in *Lapides* is based exclusively on constitutional grounds, the majority opinion in that case could be construed as upholding the constitutionality of Section 352 only when applied to a person whose residence abroad is not shown to be for a valid reason consistent with continued allegiance to the United States. If so construed, Section 352 would create a rebuttable presumption similar to the one sustained by this Court in *Luria* v. *United States*, *supra*. In *Lapides*, the majority opinion states, 176 F. 2d at 621:

> "... He [appellant] points to the failure of the statute to excuse unavoidable delays in returning to this country as evidence of its arbitrary nature. Yet he advances no excuse for his own failure to return within the permitted time. The record reveals no arbitrary application of the statute as to him. So its possible unconstitutional application to others in different circumstances cannot be considered in this case."

The Court of Appeals, however, in making the *Lapides* decision the basis for its judgment in this case seems to be sustaining the constitutionality of Section 352 even where as here the naturalized citizen is residing abroad for a reason clearly consistent with continued allegiance to the United States.

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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July 13, 1962

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, individually and as Secretary of State, *Defendant*.

Order and Judgment

Plaintiff having moved for summary judgment and defendant having moved for judgment on the pleadings, and the Court having considered the complaint, the answer and the affidavits filed herein as well as the previous proceedings herein, and being fully advised in the premises, and being advised of the order entered in this matter on July 19, 1960 by Judge Matthews, holding that no substantial constitutional question is presented by said complaint, and the Court being of the opinion that Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States,

It is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's motion for summary judgment be and it is hereby denied, and

2. That judgment on the pleadings be and it is hereby entered for defendant, and the complaint be and it is hereby dismissed.

GEORGE L. HART, JR.
Judge

Date: August 17, 1960

No objection as to form:

MILTON V. FREEMAN
Counsel for plaintiff

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,959

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually and as Secretary of State, *Appellee*

No. 16,002

DEAN RUSK, Secretary of State, *Appellant*,

v.

ANGELIKA L. SCHNEIDER, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Before: WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*.

Judgment

These appeals came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this court

(1) that in No. 15,959 the judgment of the District Court for the defendant on the pleadings and dismissing the

complaint is hereby affirmed on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F. 2d 619 (1949).

(2) that the appeal in No. 16,002 from the order of the District Court denying defendant's motion to dismiss the complaint is dismissed for the reason that the order is not appealable. *Catlin* v. *United States*, 324 U.S. 229, 236.

PER CURIAM.

Dated: May 11, 1962

APPENDIX C

LAPIDES v. CLARK, Attorney General, et al.

No. 9984.

United States Court of Appeals
District of Columbia Circuit.

Argued March 14, 1949.

Decided May 23, 1949.

Writ of Certiorari Denied Oct. 24, 1949.

See 70 S. Ct. 101.

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EDGERTON, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia).

* * * * * * * * * * * *

Before EDGERTON, CLARK, and PROCTOR, Circuit Judges.

PROCTOR, *Circuit Judge*.

This appeal is from an order of the District Court dismissing the complaint of appellant brought under Title 8,

Section 903 of the United States Code, Annotated, for a judgment declaring him to be a national of the United States and that Section 404 of the Nationality Act of 1940, as amended, 8 U.S.C.A. §§ 804, 809, is inapplicable to him.

Appellant was naturalized in 1928. He went to Palestine in 1934 and remained there until 1947, when, on July 3, he arrived in the United States. He presented his certificate of citizenship to the Immigration authorities at New York. They excluded him upon the ground that he had expatriated himself under Section 804, 8 U.S.C.A., and was an alien without a quota immigration visa. Pertinent parts of the section provide that: "A person who has become a national by naturalization shall lose his nationality by: • • • (c) Residing continuously for five years in any other foreign state, except as provided in section 806 hereof." None of the exceptions apply to appellant. He contends that Section 804 is unconstitutional; therefore, that his American citizenship remains unaffected by his prolonged residence abroad. It is argued that the law arbitrarily discriminates against naturalized citizens, and that no distinction can be drawn validly between them and native born.

"[1-3] Expatriation is a natural and inherent right of all peoples." 8 U.S.C.A. § 800. Congress has implied power to provide therefor. Mackenzie v. Hare, 239 U.S. 299, 311, 36 S.Ct. 106, 60 L.Ed. 297, Ann.Cas.1916E, 645. Obviously it cannot draw arbitrary and groundless distinctions between citizens. Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774. However, where classification has reasonable relation to legitimate legislative ends and is supported by considerations of policy and practical convenience, it is not arbitrary. Steward Machine Co. v. Davis, 301 U.S. 548, 584, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293. The guaranty of due process demands only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained.

Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

[4] The history of Section 804 accounts for its application to naturalized citizens only. It reveals a recognition by Congress of the need for legislation to lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens and their offspring residing for prolonged periods in foreign lands. See Hearings before Committee on Immigration and Naturalization on H. R. 5127 Superseded by H. R. 9980, 76th Cong., 1st Sess., 134-135, 139-141, 407-409 (1940); Sen. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940); 86 Cong. Rec. 11948, 11949 (1940); also Excerpts, Appellees' Brief, page 18.

[5-7] The statute has a purpose in the international policy of our government. The Act does not arbitrarily impose a loss of citizenship. It deals with a condition voluntarily brought about by one's own acts, with notice of the consequences. In that sense there is concurrence by the citizen. Mackenzie v. Hare, supra, 239 U.S. at page 311, 36 S.Ct. 106, 60 L.Ed. 297. There the statute, 34 Stat. 1228, provided that any American woman marrying a foreigner should take the nationality of her husband. The distinction thus drawn between female citizens marrying Americans and those marrying foreigners was held not to be an arbitrary exercise of power, as it was dictated by a policy to avoid embarrassments and controversies with foreign governments. In view of this decision, supporting classification as between native born citizens, we cannot doubt that for a similar purpose Congress has the power to distinguish between native born and naturalized citizens. Nor was Section 804 designed to apply retroactively, and it has not been so applied to appellant. He voluntarily remained in Palestine more than five years after the effective date of the Act. He points to the failure of the statute to excuse unavoidable delays in returning to this country as evidence of its arbitrary nature. Yet he advances no excuse for his

own failure to return within the permitted time. The record reveals no arbitrary application of the statute as to him. So its possible unconstitutional application to others in different circumstances cannot be considered in this case. United States v. Petrillo, 332 U.S. 1, 11, 12, 67 S.Ct. 1538, 91 L.Ed. 1877.

[8] We agree with the United States Court of Appeals for the Second Circuit that:

"* * * On the undisputed facts the appellant, a naturalized citizen who had resided continuously in Palestine for over thirteen years, had lost his citizenship by voluntary expatriation beyond the permitted time, * * *. No judicial proceedings were necessary to bring about this change of status. It followed by virtue of the statute which took effect merely through residence abroad and lapse of time. * * *" United States ex rel. Lapides v. Watkins, 2 Cir., 165 F.2d 1017, 1019.

[9] In the foregoing case, and in this, there is a virtual identity of parties and allowable issues. The purpose of each was to secure a determination that appellant is a citizen, to the end that he might obtain release from his present detention and be allowed to enter the country as a citizen. Obviously, he could have attacked the constitutionality of the Act in the habeas corpus proceedings. Had he done so, and prevailed, that would have proven a simple and speedy method of accomplishing his objectives. Evidently sensing that res judicata might apply, he cites here Collins v. Loisel, 262 U.S. 426, 43 S.Ct. 618, 67 L.Ed. 1062, and Wong Doo v. United States, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999, as authority for the proposition that the doctrine does not apply as to habeas corpus cases, overlooking the fact that the present action is for a declaratory judgment. We wonder what justification there can be for this additional and needless litigation with all its trouble, expense and delay, which the law so much abhors. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282, 66 S.Ct.

1105, 90 L.Ed. 1230, 167 A.L.R. 110; Angel v. Bullington, 330 U.S. 183, 186, 192, 67 S.Ct. 657, 91 L.Ed. 832. In view of the granting of the motion to dismiss the complaint, the respondents did not answer. That probably accounts for the fact that the habeas corpus case was not pleaded in bar of the present action. Yet evidence of that case is in the complaint itself. However, in view of the peculiar situation, we do not pass upon the question. Yet we do think, under the circumstances, that great weight should be given the conclusion of the court in the New York case, Salinger v. Loisel, 265 U.S. 224, 230, 44 S.Ct. 519, 68 L.Ed. 989; Wong Doo v. United States, supra, 265 U.S. at pages 240, 241, 44 S.Ct. 524, 68 L.Ed. 999. This we readily do, as our own conclusion is entirely in accord that appellant is not a citizen of the United States. Therefore, the judgment of the District Court is

Affirmed.

EDGERTON, Circuit Judge (dissenting).

In my opinion the appellant's expatriation and banishment are unconstitutional on two grounds. Congress may not discriminate against naturalized citizens. Arbitrary discrimination is not due process of law.

The Constitution empowers Congress "to establish an uniform rule of naturalization." Article I, § 8, Par. 4. A "rule of naturalization" regulates eligibility and procedure for becoming a citizen. It increases the number of citizens but does not divide them into classes. By authorizing Congress to prescribe who may be naturalized and how, the Constitution does not authorize it to deprive citizens either at or after naturalization of liberties that other citizens enjoy. "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." United States v. Wong Kim Ark, 169 U.S. 649, 703, 18 S.Ct. 456, 477, 42 L.Ed. 890. Chief Justice Marshall said in 1824: "A naturalized citizen

* * * becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." Osborn v. United States Bank, 9 Wheat. 738, 22 U.S. 738, 827, 6 L.Ed. 204. The Supreme Court said in 1913: "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency."[1] In the Knauer case in 1946 the Court pointed out that "there are other exceptions of a limited character" and, in a footnote, mentioned the Nationality Act.[2] But in that case the Court was dealing with cancellation of an invalid naturalization because of fraud in its procurement. The Court had no opportunity to consider and decide whether a valid naturalization may be terminated because of residence abroad.

Deprivation of liberty by severe and arbitrary discrimination is not due process of law. Aside from the Nationality

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[1] Lauria v. United States, 231 U.S. 9, 22, 34 S. Ct. 10, 13, 58 L. Ed. 101. Cf. United States v. Schwimmer, 279 U.S. 644, 649, 49 S. Ct. 448, 73 L. Ed. 889; Baumgartner v. United States, 322 U.S. 665, 673, 64 S. Ct. 1240, 88 L. Ed. 1525.

[2] The entire footnote reads: "Thus a naturalized citizen must wait seven years before he is eligible to sit in the House (Article I, Section 2) and nine years before he can enter the Senate. Article I, Section 3. Furthermore, a naturalized citizen may lose his American citizenship by residnig abroad for stated periods. Sections 404-406, Nationality Act of 1940, 54 Stat. 1137, 1170, 8 U.S.C. §§ 804-806 [8 U.S.C.A. §§ 804-806]. See Perkins v. Elg, 307 U.S. 325, 329 [59 S. Ct. 884, 886, 83 L. Ed. 1320]." Knauer v. United States, 328 U.S. 654, 658, 66 S. Ct. 1304, 1307, 90 L. Ed. 1504.

Act, citizens may live abroad. By imposing a heavy penalty on the exercise of this liberty the Nationality Act takes part of it away from all naturalized citizens, regardless of their devotion to America and their connections here. All native citizens, regardless of possible devotion to a foreign country and connections there, are exempt. Congress may expatriate citizens on reasonable grounds. No doubt these may include five years residence abroad. But it does not follow that Congress may expatriate some citizens and not others on this ground. The Mackenzie case[3] upheld as reasonable a statute that expatriated women but not men who married aliens. Some distinctions between citizens solely because of their sex are still considered reasonable. Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198. But "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774. Distinctions because of birthplace are equally arbitrary. The fact that the appellant was born in Austria is no reason for penalizing his sojourn in Palestine. Together with the immigration law the Nationality Act makes it in effect a crime punishable by banishment, which may well be called cruel and unusual, for some citizens but not for others to live five years abroad. Even complete inability, from whatever cause, to return to the United States during the five-year period gives no immunity, and a considerable number of foreign-born Americans have therefore been banished by circumstances over which they had no control.[4]

The government does not contend that the habeas corpus case of United States ex rel. Lapides v. Watkins, 2 Cir., 165 F.2d 1017, in which these constitutional questions were not raised, concludes them.

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[3] Mackenzie v. Hare, 239 U.S. 299, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645.

[4] Involuntary Loss of American Citizenship, p. 16, Report of the Special Committee on Expatriation, National Council on Naturalization and Citizenship (March 1947).

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, PETITIONER

v.

DEAN RUSK, INDIVIDUALLY AND AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 25; Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1962 (R. 25; Pet. App. B). The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952—providing for loss of United States nationality by a naturalized citizen

who continuously resides for three years in the foreign state of which he was formerly a national—is constitutional.

STATUTE INVOLVED

Sections 101, 352, and 353 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 170, 269–270, 73 Stat. 274, 8 U.S.C. 1101, 1484–1485, provide in pertinent part as follows:

> SEC. 101. (a) (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.
>
> * * * * *
>
> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> (2) having a continuous residence for five years in any foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.
>
> * * * * *

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be

brought to the United States, whose condition requires his personal care and attendance: *Provided,* That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided,* That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is the spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1), (5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period of [or]

periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States; *Provided*, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804 (b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

STATEMENT

Petitioner was born of German parents on May 28, 1934, in Bavaria, Germany, and came to the United States in 1939. Her mother was naturalized as a United States citizen in 1946. Her father was naturalized as a United States citizen on December 4, 1950, which conferred on petitioner derivative citizenship. In 1956, petitioner left the United States to marry a German citizen in Germany, and has resided there continuously with the exception of a visit of about six weeks' duration in the United States in 1957. She intends to continue to live in Germany (R. 2, 16–17). Petitioner's sons, who were born in Germany in 1957 and 1958, acquired German nation-

ality by reason of the father's citizenship, and have been registered by petitioner with the United States consulate as United States citizens under Section 301(a)(7) of the Immigration and Nationality Act of 1952 (R. 17).

In 1959, the United States denied further extension of the series of passports which petitioner has held since 1954. The State Department certified that petitioner had expatriated herself under Section 352(a)(1) of the Act by continuous residence for three years in the foreign state of which she was a national prior to naturalization as a United States citizen (R. 12–C, 17–18).

Petitioner, on February 1, 1960, filed a complaint in the United States District Court for the District of Columbia to enjoin respondent's predecessor from enforcing Section 352(a)(1), and to declare petitioner a citizen of the United States (R. 1–5). The district court entered judgment for the respondent on the pleadings (R. 24). The court of appeals affirmed, *per curiam*, citing *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860 (R. 25).[1]

ARGUMENT

1. Petitioner challenges the constitutionality of Section 352(a)(1) of the Immigration and Nationality Act (*supra*, p. 2) which provides that a naturalized

[1] The decision in the court of appeals had been postponed pending the decision by this Court in *Rusk* v. *Cort*, 369 U.S. 367, as to whether the distict court had jurisdiction of the suit instituted by petitioner while she remained abroad. This Court denied a petition for a writ of certiorari prior to judgment in the court of appeals. 366 U.S. 963.

citizen returning to his native land expatriates himself after continuous residence for three years unless he falls within certain defined exceptions included in Section 353 (*supra*, pp. 3–5).[2] Petitioner contends that the statute bears no reasonable relationship to the power of the Congress with respect to international relations and unlawfully discriminates against naturalized citizens. She also contends that the statute is unconstitutional because it constitutes cruel and unusual punishment. The government, on the other hand, submits that the court of appeals was correct in holding that the statute was constitutional on the ground that it is reasonably related to the power of Congress over foreign affairs.

Although, as noted in point 2, *infra*, pp. 15–16, we do not oppose issuance of a writ of certiorari in this case, we set forth for the Court's consideration our reasons for believing that the decision below is correct.

a. This Court in *Perez* v. *Brownell*, 356 U.S. 44, upheld the power of Congress to provide for expatriation as the result of a voluntary act which Congress reasonably finds may embarrass the conduct of foreign relations or embroil the United States in international disputes. Congress has long regarded the residence of a naturalized citizen in the country of his birth as such a problem and has tried various ways of dealing with it. Many treaties concluded by the United States with foreign nations provided and still provide for loss of citizenship by a United States naturalized

[2] Section 352(a)(2) provides that a naturalized citizen loses his citizenship if he has continuous residence abroad for five years in any other foreign state.

citizen who reestablishes residence in his country of origin. *Perkins* v. *Elg*, 307 U.S. 325; Van Dyne, *Naturalization* (1907), p. 335. By executive policy, formulated prior to legislative action, diplomatic protection was denied to naturalized citizens who abandoned their domicile in the United States. See 3 Hackworth, *Digest of International Law*, pp. 286–288. In 1906 Congress provided by Section 15 of the Act of June 29, 1906, 34 Stat. 601, that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed presumptively fraudulent and subject to revocation. The constitutionality of this enactment was sustained in *Luria* v. *United States*, 231 U.S. 9. In Section 2 of the Act of March 2, 1907, 34 Stat. 1228, Congress provided that:

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen * * *.

Section 404(c) of the Nationality Act of 1940 was therefore not a fundamental departure from prior

[3] See the following treaties or conventions: Albania, 49 Stat. 3243 (1932); Belgium, 16 Stat. 748 (1868); Costa Rica, 37 Stat. 1604 (1911); Czechoslovakia, 46 Stat. 2425 (1928); Denmark, 17 Stat. 943 (1872); Salvador, 35 Stat. 2039 (1908); Haiti, 33 Stat. 2102 (1902); Honduras, 36 Stat. 2161 (1908); Lithuania, 53 Stat. 1570 (1937); Nicaragua, 37 Stat. 1561 (1908); Norway, 17 Stat. 812–813 (1869); Peru, 36 Stat. 2182 (1907); Portugal, 35 Stat. 2083–2084 (1908); Sweden, 17 Stat. 812–813 (1869); Uruguay, 36 Stat. 2166 (1908); Argentina, Chile, Colombia, Costa Rica, Ecuador, Salvador, Honduras, Nicaragua, Panama, 37 Stat. 1655 (1906).

law. Rather, this provision was a new remedy for dealing with an old problem in international relations. Before enactment of the Nationality Act of 1940, Congress was told that the methods theretofore used—administrative or statutory withdrawal of diplomatic protection and statutes raising merely evidentiary presumptions—had proved unsatisfactory.[4] Naturalized citizens who returned to live in their country of birth were a continuing source of demands for protection and service from the United States government and were a "constant source of irritation."[5] Many such naturalized citizens also had children who acquired United States citizenship by birth and, in many instances (as in this case) the nationality of the foreign state as well, thus raising the possibility of embroiling the United States government in controversies with the government of the country in which they resided.[6] Moreover, Congress believed:[7]

> [A] definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American nationality of the persons

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[4] Hearings before Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980 [hereinafter Hearings], 76th Cong., 1st Sess., pp. 135, 409.

[5] Hearings, pp. 495, 241; S. Rep. 2150, 76th Cong., 3d Sess., p. 4.

[6] Hearings, p. 407; S. Rep. 2150, 76th Cong., 3d Sess., p. 4.

[7] Hearings, p. 495.

> concerned when they return to their countries of origin for *legitimate* objects and for residence of a temporary character. [Emphasis added.]

In short, there has been, and continues to be, a substantial problem in the conduct of foreign affairs resulting from the return of naturalized American citizens to their native lands. Section 404(c) of the Nationality Act and its successor, which is involved in this case, represent a Congressional judgment as to the appropriate remedy.

b. Petitioner argues that, nevertheless, the statute is invalid because it makes a distinction between naturalized and native-born citizens. There is, however, considerably greater likelihood that international complications will arise when a naturalized citizen returns for permanent residence in a foreign country, particularly when it is the country of which he formerly was a national. A naturalized citizen in his former homeland is far more likely to be involved in the affairs of the foreign country, and to be treated by the foreign country as its own national (for example, for purposes of taxation and military service), for in that situation there is an obviously intimate relationship to the country. Consequently, for about one hundred years, naturalized and native-born citizens have been subject to different standards in regard to expatriation. See *Perez* v. *Brownell,* 356 U.S. 44, 49.

It is of course true that international problems may be caused by citizens born in the United States who

reside abroad for an extended period. But Congress may legislate for one evil at a time and may decline to legislate concerning other conduct it does not deem of equal danger. See *United States* v. *Petrillo*, 332 U.S. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Patsone* v. *Pennsylvania*, 232 U.S. 138, 144. On the basis of evidence it deemed satisfactory, Congress restricted Section 352, unlike other expatriation provisions,[8] to naturalized citizens, because foreign residence by such groups had more possibility of producing international disputes. The judgment, we believe, was reasonable and within the exclusive competence of the Congress.

The fact that not every naturalized citizen returning to his country of origin causes international difficulties also does not negate the validity of the congressional judgment that the problem is sufficiently serious to require legislative action. It would be virtually impossible to separate out those naturalized citizens who will cause international problems from those who will not. Congress has exempted from the operation of the statute several categories of aliens who are least likely to cause international complications by residing abroad—for example, the elderly and ill, and those employed by the government of the

[8] Where a citizen's conduct in a foreign country will not, in ordinary experience, have a different effect whether naturalized or born in the United States, no differentiation has been made. For example, voting in a foreign election terminates citizenship by birth just as by naturalization. See *Perez* v. *Brownell*, 356 U.S. 44.

United States or by American business concerns (see *supra*, pp. 3–5). It was not required to make further minute distinctions.

Nothing in the Constitution prohibits differentiation between natural-born and naturalized citizens on a reasonable basis. Indeed, the Constitution itself embodies differences based on citizenship at birth, *e.g.*, the limitation of eligibility for the Presidency to "natural born" citizens. Art. II, Sec. 1. And a naturalized citizen must wait seven years before he is eligible to sit in the House of Representatives (Art. I, Sec. 2) and nine years before he can sit in the Senate (Art. I, Sec. 3).

In short, since there is a reasonable basis for treating naturalized citizens differently from native born with respect to the effect of residence abroad, there is no constitutional infirmity in the legislation. The legislative process permits varying treatment of different groups in order to accomplish substantial public purposes. *Truax* v. *Corrigan*, 257 U.S. 312, 337. Classification is a perfectly permissible device; only unreasonable classifications are unconstitutional. *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410; *Clarke* v. *Dekebach*, 274 U.S. 392. On many occasions, this Court has upheld differentiations in treatment affecting various groups of citizens and residents, upon a showing that the classification was reasonably devised to meet a demonstrated need.[9]

[9] *Terrace* v. *Thompson*, 263 U.S. 197; *Heim* v. *McCall*, 239 U.S. 175; *Patsone* v. *Pennsylvania*, 232 U.S. 138; *Porterfield* v. *Webb*, 263 U.S. 225; *Cockrill* v. *California*, 268 U.S. 258; *Clarke* v. *Dekebach*, 274 U.S. 392; *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491.

c. Petitioner suggests (Pet. 14), citing the opinion of the Chief Justice in *Trop* v. *United States*, 356 U.S. 86, 97, that Section 352 is unconstitutional because it constitutes cruel and unusual punishment. In *Trop*, however, the act of deserting the armed forces was itself a crime. The Chief Justice stated that the only purpose of denationalization was additional punishment and therefore the statute was unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment. In contrast, in *Perez* v. *Brownell*, 356 U.S. 44, the Court upheld a section of the Nationality Act of 1940 providing for the expatriation of citizens voting in foreign elections. The Court reasoned that the statute was a reasonable exercise of Congress' power over foreign affairs in that it was designed to prevent international problems arising when American citizens voted in elections in other countries.

Section 352(a)(1), like the provision involved in *Perez* and unlike that in *Trop*, does not base expatriation on criminal conduct. Petitioner's return to live in Germany was obviously not a crime and her expatriation was not an attempt to punish. Instead, as in *Perez*, Congress passed Section 352(a)(1) as a reasonable exercise of its broad power over foreign affairs in order to avoid continuing international difficulties.

d. The decision in *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860, sustained the constitutionality of Section 404(c) of the Nationality Act of 1940, the almost identical predecessor to Section 352 of the 1952 Act, which is involved

in this case."[10] Both sections provide for expatriation upon prolonged stay of a naturalized person outside the United States; Section 404(c) of the 1940 Act required five years' residence in any foreign country; Section 352(a)(1) applies to three years' residence in the country of the naturalized citizen's birth or former nationality. *Lapides* v. *Clark* has been favorably cited in several subsequent decisions of this Court and of the courts of appeals. See *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 391; *United States* v. *Bendik*, 220 F. 2d 249, 252 (C.A. 2); *Societe Internationale* v. *Brownell*, 225 F. 2d 532, 540 (C.A. D.C.), reversed on other grounds, 357 U.S. 197."[11]

---

[10] Petitioner suggests (Pet. 14, note 5), that *Lapides* v. *Clark* holds that Section 404(c) created only a presumption that prolonged residence abroad is inconsistent with continued allegiance to the United States and that, as so construed, Section 404(c) is constitutional. It is clear, however, from the language of Section 404(c) that a naturalized citizen residing abroad for five years loses his citizenship regardless of his subjective allegiance. The most that the portion of *Lapides* v. *Clark* relied on by petitioner indicates is that, if a naturalized citizen attempts to return to the United States within five years and through no fault of his own cannot do so, application of the statute to him might be arbitrary and unconstitutional. Even if that faint suggestion is correct, it has no application to this case; petitioner does not claim that after leaving the United States in 1956 to take up residence in Germany, she has ever attempted, or even intended, to resume residence in this country.

[11] Only shortly prior to the decision of the District of Columbia Circuit in *Lapides* v. *Clark*, the Second Circuit reached the same result in a habeas corpus proceeding, involving the same plaintiff, without discussing the issue of constitutionality. *Lapides* v. *Watkins*, 165 F. 2d 1017.

And *Lapides* has been expressly followed in three district court decisions considering the provisions of either the 1940 or 1952 Acts. *United States v. Cuccaro*, 138 F. Supp. 847, 856 (E.D. N.Y.); *Rosasco* v. *Brownell*, 163 F. Supp. 45, 57 (E.D. N.Y.); *Guerrieri* v. *Herter*, 186 F. Supp. 588, 590 (D. D.C.), affirmed, 283 F. 2d 368 (C.A. D.C.). *Lapides* v. *Clark* was also cited in Senate Report No. 1515, 81st Cong., 2d Sess. (April 20, 1950), p. 753, the comprehensive study which underlay the Immigration and Nationality Act of 1952. The report recommended tightening of Section 404(*c*) of the 1940 Act with respect to brief interruptions of the residence abroad, and recommended liberalization by means of numerous exceptions, *e.g.* the case of a person living abroad because of the ill health of a parent, spouse, or child (*id.* at pp. 767–768).

2. We have contended above that the court of appeals was correct in holding that Section 352(a)(1) is constitutional. The issues in this case are, however, of considerable importance both to the United States and to its naturalized citizens. The State Department reports that, during a recent twelve-month period, it made 1065 determinations of loss of nationality under Section 352(a)(1). In addition, it made 179 determinations of loss of nationality under Section 352(a)(2), *supra*, which provides that a naturalized citizen expatriates himself if he has continuous residence abroad for five years, regardless of the particular country involved.[12] While we believe that

[12] These 1244 determinations of loss of nationality under Section 352 as a whole resulted from 12,547 adjudications.

the decision below was correct, because of the importance of the issues presented respondent does not object to the granting of a writ of certiorari.

3. It should be noted, although the point is not raised in the petition,[*] that a question of statutory interpretation may be involved in the case. Petitioner returned to the United States for six weeks to visit her parents during the three-year period on which respondent based his determination of loss of nationality. This visit would not seem to interrupt petitioner's residence in Germany since residence is defined in Section 101(a)(33) of the Act, *supra*, p. 2, as "the place of general abode," *i.e.*, the "principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous * * * where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States." Despite this definition, however, it has been held, in a case involving Section 352(a)(2), that visits of eleven weeks and three weeks to the United States for purposes of study during a five-year period broke continuous residence abroad. *Guerrieri* v. *United*

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[*] The issue was also not raised in the district court. In the court of appeals, petitioner's main brief merely noted the six-week visit to the United States and indicated that this did not break her continuous residence abroad (p. 31). In her reply brief in that court, she stated that the *Guerrieri* decision, if applied to her case, would mean that she had not had continuous residence abroad for three years.

States, 186 F. Supp. 588 (D. D.C.), affirmed on the opinion of the district court, 283 F. 2d 368 (C.A. D.C.). We believe that this decision is incorrect because it is inconsistent with the clear definition of residence in the statute and that, furthermore, it does not cover the single six-week visit in this case.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, *Petitioner*

v.

DEAN RUSK, individually, and as SECRETARY OF STATE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR RESPONDENT

The respondent states in its Memorandum that "because of the importance of the issues presented respondent does not object to the granting of a writ of certiorari." (Memorandum p. 16; See also p. 8) Respondent then details the reasons why the issues in this case are "of considerable importance both to the United States and to its naturalized citizens." (*id*, p. 15).

These assertions by the respondent dispose of the only questions before this Court at this time. Sup. Ct. Rule 19. The respondent's discussion of its reasons

for believing that the decision below is correct is thus unnecessary at this time. Petitioner therefore reserves its arguments for reversal of the decision below until such time as presentation of a brief on the merits shall be in order.

Respectfully submitted,

MILTON V. FREEMAN

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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Tsiang, The Question of Expatriation in America Prior to 1907 (1942), Chapt. 1, pp. 75, 88, 90, 99	7, 8, 9n
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IN THE

Supreme Court of the United States

October Term, 1962

No. 251

ANGELIKA L. SCHNEIDER,

Petitioner,

v.

DEAN RUSK, Individually and as Secretary of State,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, we seek to guard against the arbitrary deprivation of our birthrights. In the last ten years 15,709 naturalized Americans were

deprived of their citizenship by reason of residence abroad. During this period this ground of expatriation exceeded all others. (1961 Annual Report of the Immigration and Naturalization Service, p. 96,) Most countries of the world do not deem it advisable to predicate loss of citizenship upon this basis.

We believe that the expatriation of naturalized citizens by reason of foreign residence constitutes an encroachment upon the rights of American citizenship given to individuals under the Fourteenth Amendment and that it establishes an unconstitutional discrimination which was neither contemplated nor favored by the draftsmen of our Constitution. This brief is submitted in an effort to assist the Court in its analysis of this encroachment and this discrimination, as well as the constitutional problems thereby raised.

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 4

The Congress shall have power * * * to establish a uniform rule of naturalization.

Article II, Section 1, Clause 5

No person except a natural born citizen * * * shall be eligible to the office of President.

Fifth Amendment

No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

IMMIGRATION AND NATIONALITY ACT OF 1952

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U. S. C. § 1484, reads as follows:

"Loss of nationality by naturalized national

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act."

Question Presented

Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U. S. C. 1484) providing for the loss of American citizenship by a naturalized citizen who resides continuously in the foreign state of which he was formerly a national, is constitutional.

Statement

Petitioner, Angelika Schneider, born in Germany during 1934, came to the United States at the age of five, became an American citizen through derivative naturalization in 1950, and remained here continuously from 1939 until 1954. In 1956 she left the United States to marry a German lawyer with whom she has resided ever since with the exception of a six week visit to the United States in 1957 (R. 2, 16-17). Petitioner's two sons, born in Germany in 1957 and 1958 have been registered as Americans under 8 U.S.C.

1401(a)(7) (R. 17). However, in 1959 the State Department ruled that petitioner's citizenship was forfeited by three years' continuous residence in Germany. Her six week visit to the United States in 1957 was not considered of sufficient duration to break the continuity of her foreign residence (R. 12-C, 17, 18.).

Summary of Argument

Article II, Section 1, Clause 5 of the Constitution creates a single, narrowly defined limitation upon the rights of naturalized citizens. They are denied eligibility for the office of the President. No other distinctions between native and naturalized Americans are constitutionally proper. *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824); *Luria* v. *United States*, 231 U. S. 9, 22, 24 (1913).

Sources and guides customarily utilized by the courts in ascertaining the meaning of the Constitution all reinforce the view that no other distinction was contemplated. Early English law granted the naturalized citizen equality with the native born. *Coke on Littleton*, fol. 129 a (1628); *Blackstone's Commentaries*, Book I, Chap. 10; *Collingwood and Pace*, 1 Vent. 413, 420, 429; 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664); *Regina* v. *Manning*, 2 Car and. K 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849).

Colonial laws of Virginia, Maryland, Pennsylvania, Massachusetts and Delaware granted the naturalized citizen all the privileges of natural born subjects. "The effect of naturalization in the several States before the Constitution was adopted was, therefore, to remove alienage, the person naturalized standing in all respects upon the same plane with the natural born citizen, except that he was under certain removable political disabilities", *House Document 326*, 59th Cong. 2d Sess., (1906) p. 9.

During the constitutional debates it was suggested that eligibility for Congressional office be confined to natives.

IV *Writings of James Madison* (Putnam's Sons, 1906), p. 172; 2 *Farrand, Records of the Federal Convention* 238. The desire to encourage the immigration of worthy foreigners and the dilemma which such a proposal would cause the colonies whose laws had pledged equality between native and naturalized citizens was successfully urged to defeat this proposal. 2 *Farrand, supra*, 270-272; IV *Writings of James Madison, supra*, 173-176.

When the question of the impressment of American seamen arose, Secretary of State James Monroe advised the British Minister that the United States could not discriminate between the native and naturalized citizen, nor ought the British Government "expect it as it makes no such distinction itself". *American State Papers, Foreign Relations*, III, 1787-1828, pp. 454, 464. President Madison, the chief draftsman of the Constitution, likewise asserted "By our law, all the rights of natives are given to naturalized citizens". *Ibid.* at 696.

In 1859 Attorney General Black advised President Buchanan that "a native and naturalized American may * * * go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born". 9 *Op. Atty. Gen.* 360 (1858-59). Attorney General Williams similarly advised President Grant in 1873 that he knew of no principle upon which the rights of native and naturalized citizens residing abroad could be distinguished. *Foreign Relations of the United States*, 1873, Vol. II, pp. 1216, 1218. The Expatriation Act of 1868 (15 Stat. 223, Revised Statutes, Sec. 2000) not only declared that "the right of expatriation is a natural and inherent right of all people", but also asserted that "All naturalized citizens of the United States while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens". In the debates which led to this enactment, it was frequently acknowledged that

naturalized and native-born citizens were identical before the law of this country. *Congressional Globe*, 40th Cong. 2d Sess. (1868), pp. 832, 1013, 1015, 1018. In 1868 the Fourteenth Amendment reasserted, without differentiation, that all persons born or naturalized in the United States are citizens.

It is in the light of this background that the legislative distinctions between native and naturalized Americans must be judged. The 1907 Expatriation Act has been construed to deny diplomatic protection to a naturalized citizen residing abroad for more than two years in his native state or five years in any other foreign state (34 Stat. 1228). However, the Nationality Act of 1940 (54 Stat. 1170, 8 U. S. C. 804) decreed automatic expatriation for naturalized citizens who reside abroad for prescribed periods. These provisions were reenacted in the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U. S. C. 1484).

The justification for the present discrimination against naturalized citizens is said to be founded in the international policy of our government to lessen friction with foreign governments. *Lapides* v. *Clark*, 176 F. 2d 619 (C. A. D. C., 1949). Testing this discrimination by the standard of *Perez* v. *Brownell*, 356 U. S. 44, 60 (1957), we believe that the means adopted, the withdrawal of citizenship from a selected category of citizens, is not reasonably calculated to effect the end that is within the power of Congress to achieve, and that its differentiation between native born and certain naturalized citizens is so arbitrary as to be a deprivation of due process. The discrimination is based solely upon place of birth. Distinctions "between citizens solely because of their ancestry", this Court has said, "are by their very nature odious to a free people". *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Distinctions based upon place of birth are no different. Judge Edgerton, dissenting, *Lapides* v. *Clark*, *supra*.

ARGUMENT

I

Historical background and purpose in provisions for expatriation by reason of foreign residence.

The English doctrine of perpetual allegiance naturally precluded expatriation by foreign residence. Under this doctrine citizens might remain abroad indefinitely. *Tsiang, The Question of Expatriation in America Prior to 1907* (1942), Chapt. 1.

In the United States prior to the Act of 1907 there is record twice of Congressional objections against permitting American citizens, native and naturalized, to live abroad. A bill introduced in the House of Representatives in 1808 would have confined citizenship to persons only "while they actually reside in the United States" and would have forever barred from reacquiring citizenship any person expatriated for foreign residence. 18 Cong. Annals 1871, 10th Cong., 1st Sess. The bill died in committee. *Ibid.*

Loss of protection for those who resided permanently abroad was suggested also in the bill from which the Expatriation Act of 1868 evolved. *House Document 326*, 59th Cong., 2nd Sess., pp. 23, 24. However, this proposal was abandoned in the ultimate legislation and Congress expressly affirmed the right of naturalized citizens to receive the same protection, while in foreign countries, which is accorded to native born citizens. 15 Stat. 223, Revised Statutes, Sec. 2000.

In 1906 a three member citizenship board appointed by Elihu Root recommended that expatriation might be assumed when an American—either native born or naturalized—becomes domiciled in a foreign state. This was

suggested as a rebuttable presumption. In support of this proposal it was said:

> "• • • the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.
>
> "• • • Naturalized citizens are more apt to go abroad than native citizens. Having already changed their domicile, they are more apt to change it again. • • • It is the duty of the Executive to protect every American from unlawful molestation, but it is not his duty to protect an American from just punishment for violating any law of a foreign country, and the refusal of protection is not necessarily a denial of American citizenship." *House Document 326, supra,* pp. 23, 25, 26.

The embarrassment in question related primarily to the impressment of male citizens into the armed forces of European countries. Great Britain had impressed native-born and naturalized Americans in 1812. Later we experienced difficulties with Prussia and other countries as a result of the enforcement of their conscription laws. *House Document 326, supra,* pp. 9-10; *Tsiang, supra,* pp. 75, 99. These problems, however, have been resolved or mitigated by the conclusion of naturalization or military treaties. III *Hackworth, Digest of International Law (1942),* p. 166.[1]

[1] Treaties were concluded with various countries beginning in 1868 when one was concluded with the North German Confederation. 15 Stat. 615. These treaties acknowledged the right of expatriation and permitted punishment for offenses committed prior to emigration. Some required five years residence in the adopted country before expatriation would be recognized. Some like the convention adopted by the Third International Conference of American States held at

[Continued on page 9]

Contrary to the recommendations of the 1906 Citizenship Board, Congress in 1907 provided for presumptive loss of citizenship solely for naturalized citizens residing abroad in a country from which they came for two years or in any other foreign country for five years. 34 Stat. 1228. This was interpreted to provide merely for loss of diplomatic protection rather than for loss of citizenship itself. *Camardo v. Tillinghast*, 29 F. 2d 527, 530 (C. A. 1, 1928). Under the rules of the State Department, moreover, the presumption of loss of protection might be overcome by the making of "definite arrangements to return immediately to the United States permanently to reside". III *Hackworth, supra*, p. 296.

The Nationality Act of 1940 for the first time provided for the loss of citizenship for naturalized citizens residing abroad for three years in countries of their nativity or former nationality or in any other foreign state for five years. 8 U. S. C. 804(b) and (c); 54 Stat. 1170. In suggesting the change from loss of protection to loss of citizenship, the State Department's Passport Office through Mr. Flournoy testified:

> "This, Mr. Chairman, I should say is the most important proposed change in the whole code, and may be the subject of some controversy. We in the State Department, and so far as I know those in the other Departments, think it is a reasonable

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[Continued from page 8]

Rio de Janeiro in 1906, provide for a presumption of expatriation and reacquisition of native born citizenship when a naturalized citizen resumes residence for two years in the country of his birth. *Tsiang, op. cit.*, pp. 88, 90; III *Moore, International Law Digest* (1906), pp. 358, *et seq.*; III *Hackworth, supra*, p. 377.

For the full text of some of these treaties see *Hearings on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., pp. 626, *et seq.* Both the Nationality Act of 1940 and the Immigration and Nationality Act of 1952 (with limited exceptions) provided that its provisions should not be applied in contravention of existing treaties. 8 U. S. C. 810 1489.

> and most desirable provision. We have every day in the State Department cases of persons applying to us for passports or protection, or asking us to support claims, who have been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years. We think there should be some point at which such persons should lose not only his right to protection but his citizenship itself. We consider it very undesirable that we should have persons who are not entitled to the protection of our Government and yet remain as citizens of the United States. It makes it difficult for us to extend the effect of protection to those who are really citizens and have maintained connections with the United States, to have these people retaining their citizenship." *Hearings on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., pp. 134-5.

In the message transmitting the draft of the 1940 Act to the President by the Secretaries of State and Labor and the Attorney General, it was said that:

> "In general the right to protection should be co-existent with citizenship, and a law under which persons residing abroad are denied the protection of the Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable. The admission of an alien to the privilege of American citizenship is subject to the condition that he intends to reside permanently in the United States and perform the duties of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow." *Hearings on H. R. 6127, superseded by H. R. 9980, supra,* p. 409.

The explanatory comments of the draft code of the Nationality Act of 1940 set forth this basis for the expatriation provisions:

> "While the provision of subsection (b) for loss of nationality in cases of naturalized citizens who

> reside for three years in their countries of origin may appear somewhat drastic, it is believed to be fully warranted, by the numerous cases which have been brought to the Department's attention in past years, especially in connection with applications for passports or consular registration, for diplomatic protection, or for the support of claims against the governments of such countries. This provision is not in conflict with the position taken by the Government of the United States in past years with regard to protection of naturalized citizens or with treaties on that subject * * *. * * * It is not to the advantage of the United States to attempt to extend diplomatic protection to such persons who are a distinct liability, rather than an asset, to this country. Moreover (what is quite important), it is believed that a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American nationality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character. * * * Needless to say, naturalized citizens who resume residence in foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing to a degree, if not completely, their American character and feeling. *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, pp. 495, 496.

Thus, it appears from the foregoing and the thirteen illustrative cases set forth in the hearings at pp. 497-501, that the Department of State was concerned with: (1) Making protection coextensive with citizenship. This could be accomplished by retaining both or terminating the citizenship of those residing abroad. Congress chose to terminate. (2) Preventing the transmission of citizenship to children born to naturalized citizens residing abroad. This was accomplished by requiring an American

citizen married to an alien to reside in the United States for ten years prior to the birth of the child. 8 U. S. C. 1401(a)(7). (3) Encouraging naturalization treaties. Generally, naturalization treaties contained their own provisions for loss of citizenship or protection. Most of them—as in the case of those with various South and Central American states—provide for presumptive loss of citizenship where there is two years residence in one's native country. The 1940 statute was, therefore, inconsistent. In fact, there is no evidence that it has encouraged the conclusion of any treaty whatsoever. (4) Preventing the exercise of citizenship rights by persons who did not intend to reside here permanently at the time of naturalization. This situation can be and is handled by strict enforcement of our naturalization requirements and denaturalization proceedings. 8 U. S. C. 1451(d). (5) Preventing naturalized Americans from renewing "old associations and ways of living and thinking". If such conduct cannot be regulated while the naturalized American is in the United States, can it be regulated during his residence abroad?

Under the 1940 Act naturalized citizens were exempted from the ban on three and five year residences abroad if they were in the employ of the Government, compensated by the Government and residing abroad on account of disability incurred in its service, over sixty-five with a twenty-five year residence in the United States after naturalization, residing abroad to represent a bona fide American organization and receiving substantial compensation therefor, residing abroad on account of ill health, residing abroad to study for not more than five years, residing abroad to be with a naturalized American husband, wife, or parent who is exempt, and if they were native American women who lost citizenship through marriage and reacquired it through naturalization. 8 U. S. C. 805, 806; 54 Stat. 1170. In 1942 exemptions were extended to those residing abroad to be with a spouse or parent who had been in the United States

for ten years during minority, and to veterans of the Spanish American War and the World War and their families. 8 U. S. C. 806(g) and (h), 56 Stat. 1086.

By reason of World War II, the effective date of the expatriation provisions in question was postponed on several occasions. It did not become effective until October 14, 1946. 8 U. S. C. 809, as amended by 59 Stat. 544. These postponements, however, were not sufficient.

In March of 1947 a Special Committee of the National Council on Naturalization and Citizenship published a report on the "Involuntary Loss of American Citizenship." This report was prepared in collaboration with the Department of State and "the sources from which information was obtained were, primarily, American consuls in foreign countries, American social agencies * * * American business organizations having branches or affiliates in foreign countries and interested individuals." In part, this report states:

> "Difficulty in obtaining transportation because of lack of space on passenger boats was reported as the factor known to have caused loss of citizenship by consuls in South Africa, Argentina, Portugal, Sweden, Spain and Italy. A related factor was the high cost of passage from distant points and the inability of some persons to raise the necessary funds within the two months period before the deadline." * * * (pp. 11-12)
>
> "Delays in dealing with requests for passports and other papers by staffs of Government departments in the United States were alleged to have been responsible for the loss of citizenship in several cases." * * * (p. 14)
>
> "The agencies who reported to your Committee give vivid illustrations of further causes. Some persons did not return on time because of the seaman's strike; some could not return because in countries such as Yugoslavia, Roumania and Russia they were unable to obtain exit permits. The war

brought financial stringency to others making it impossible for them to pay their own passage home or to bring their families with them. Others could not return because they could not obtain exit permits or transportation or necessary travel documents. The search for proof of naturalization took time and the preparation of necessary documents was often delayed by congestion in the offices of American government agencies.

"It is clear that through the enactment of our expatriation laws a considerable number of American citizens were unduly deprived of their citizenship, contrary to their own volition, by factors beyond their own control." (p. 16)

Our State Department has been less than happy with the provisions of law which expatriate naturalized citizens residing abroad. On May 20, 1950,[2] Ruth B. Shipley, then Chief of the Passport Division, said:

"The problem is how to remedy the unexpected cruelty and injustice of those sections of the Code relating to the involuntary loss of nationality—by that I mean loss by:

* * * *

"Living two or three years in one's native land or five years in a third country.

* * * *

"Residence in one's native land to nurse a sick and elderly parent or a near relative who is helpless

[2] See New York Times of May 21, 1950. Compare the views of Mrs. Shipley in the *Joint Hearings on S. 716*, 82nd Cong., 1st Sess., p. 247, where she confined her views to the removal of expatriation for those residing in third countries. In her testimony she observed: "* * * there are a large number of American women married to foreigners, to men of real distinction and ability and importance in their own country. Well, of course, they are in those countries to live with their husbands, but their being Americans, and presenting in the foreign country the American way of life, friendliness, and good will, I think is a distinct asset for our country, and one particularly at this time."

and alone and perhaps a war casualty has caused many of our citizens to lose citizenship. Do you feel that such unselfish service justifies the loss of citizenship by a naturalized American citizen? The penalties of homesickness and longing to be reunited with family and home in America seem of themselves a heavy price to pay for the normal filial devotion native in our people.

"It is the duty of the Government to protect its citizens. Why, then, should we make stateless persons of those naturalized citizens—doctors, dentists, lawyers, clergymen, engineers, financiers, who work in third countries under the proud titles of American doctor, dentist, etc., just because the calendar rolls up five years residence abroad. Are they not really good neighbors promoting one of our great principles and raising the standards of life through their fine professional training in American institutions—and yet—they are made stateless.

"There is no great change in world affairs that makes it wise or necessary or even desirable to cast away so lightly our citizens who have chosen this country above all others and inflict on them one of the gravest tragedies of all times—statelessness. There are many other instances with which you are familiar which seem to indicate beyond any question that the present law works hardship never dreamed of by those enacting it. We might take a lesson from the British in this. They have always had world-wide interests and realize the importance of keeping loyal British subjects.

"Inasmuch as there has been introduced into the Senate a new version of the Nationality Code, we will be invited to express our recommendations to the Congress and it seems to me the clear duty of those of us who understand the injustice and the un-American character of the penalties inflicted at present on some of our citizens to work earnestly to change the law by presenting the clear picture to our Congress, remembering that the Secretary of State has always the power inherent in his position to withdraw the protection of this Government from

any citizen, native or naturalized, whose actions abroad are inimical to the best interests of the United States. No cancellation of citizenship is necessary. It seems to me the traditional position of this Government that the loss of citizenship should result from a direct act of the citizen which is generally regarded as inconsistent with allegiance to the United States and as expatriation, such as voluntary naturalization in a foreign country, taking an oath of allegiance to a foreign sovereign, taking the oath of renunciation of American citizenship, committing treason or deserting the armed forces in time of war. These represent a group of disloyal acts for which cancellation of citizenship is a normal penalty.

"'Reviewing the position of our country today as we endeavor to bind up the wounds of the war and to aid in economic recovery many of the nations and also to better the conditions of the backward countries, we must seriously consider the spiritual and moral devastation wrought unintentionally by acts of our own law. It is our impelling duty to bring the nationality law into harmony with the declaration of human rights and the moral code of brother toward brother.''

The bar against foreign residence for three and five years was continued by the Immigration and Nationality Act of 1952. 8 U. S. C. 1484, 66 Stat. 269. The exempt class was expanded to permit residence abroad by reason of the ill health of parent, spouse or child. Inhabitants of American possessions acquiring naturalization by Act of Congress or treaty are placed "on a par with native born citizens with respect to freedom to live abroad indefinitely without losing United States nationality". 8 U. S. C. 1485(10). Veterans of World War I residing in their native lands on the effective date of the Act are permitted to continue their foreign residence. Otherwise, all veterans are exempt solely from the five year residence ban. They are denied residence of more than three years in the country

of their former nationalities. 8 U. S. C. 1486, 66 Stat. 271; *House Report 1365*, 82nd Cong., 2d Sess., p. 85.

These discriminatory provisions have evoked widespread criticism.[3] Typical is the statement of former President Eisenhower on October 21, 1952:

> "Only second-class Americanism tolerates second-class citizenship. It's time to get rid of what remains of both, and that includes rewriting the unfair provisions of the McCarran Immigration Act." *New York Times*, October 22, 1952.[4]

In the same vein, Adlai E. Stevenson wrote on December 28, 1955 (102 Cong. Rec. 83, 84, January 5, 1956):

> "The McCarran-Walter Act of 1952 subjects naturalized citizens to restrictions which do not apply to native-born citizens, for instance, in the matter of the permissible length of residence abroad. The claim that there is no satisfactory basis for such distinctions seems sound * * *."

[3] Many witnesses appearing before the President's Commission on Immigration and Naturalization in 1952 were critical of what they called the "second-class" citizenship provisions of our nationality laws. *Whom We Shall Welcome, Report of the President's Commission on Immigration and Naturalization* (1953), p. 236.

[4] In a letter dated April 22, 1953, addressed to Senator Watkins, former President Eisenhower said:

> "In the State of the Union Message I pointed out that 'existing legislation contains injustices'. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following:
>
> * * *
>
> "4. The provisions under which it is asserted, naturalized citizens have only 'second-class' citizenship because they, as distinguished from native-born citizens, can be expatriated because of residence abroad for certain periods of time, without reference to any other conduct on their part." *Konvitz, Civil Rights in Immigration* (1953), pp. 190, 191.

Thomas K. Finletter observed in a speech on June 12, 1956 (*American Immigration Policy, Selected Statements*, American Immigration Conference, 1957, p. 9):

> "Then too, and deserving of a special category, is the shameful idea of a caste system which we have introduced in this country. We have two kinds of American citizens. We have American-born citizens and American-naturalized citizens. The rights of the two are very different. Just how far this country of ours can go in for this peculiar and un-American idea of caste is beyond me."

II

Congress has no power to discriminate against naturalized citizens by depriving them of their citizenship under circumstances which would not result in such loss by native born citizens.

The Government of the United States is one of delegated and limited powers; it derives its existence from the Constitution and can claim no powers except those granted expressly or by implication in that document. Amendment X; *Marbury* v. *Madison*, 5 U. S. 137 (1803); *Martin* v. *Hunter's Lessee*, 14 U. S. 304 (1816).

The sole power granted Congress with respect to naturalized citizens is found in Article I, Section 8, Clause 4 of the Constitution which grants Congress the right to establish "an uniform Rule of Naturalization." Reading this section against the background of the legal principles prevailing at the time of the framing of the Constitution, the historical circumstances surrounding its incorporation into our supreme law, and the social need it was framed to meet, the conclusion is inevitable that the naturalization contemplated by the Constitution was a naturalization which when validly achieved would place the naturalized citizen on an equal footing with the native born. Thus, under the doc-

trine of limited powers, the sole power granted the Congress is to provide a procedure whereby aliens may attain this parity with native born citizens. Any attempt by Congress to destroy or derogate from the rights and privileges of naturalized citizens and to impose on them liabilities, obligations and burdens not imposed on the native born is beyond its constitutional authority.

This clearly conceived constitutional limitation on Congressional power is indicated not only by the naturalization clause itself, but by Article II, Section 1, Clause 5 of the Constitution which states that "No person except a natural born citizen * * * shall be eligible to the Office of President". Under a well established rule of construction, this specific provision for a single, narrowly defined restriction on naturalized citizens implies the denial of the general power to treat such citizens differently from those born in the United States.[5]

By expressly providing for one distinction between naturalized and native born citizens, that is, eligibility to the Presidency, the Constitution itself has prescribed the only permissible distinction between these citizens. Congress may make no other.

(A) Judicial Expressions

The courts have consistently recognized this want of power in Congress to derogate from the rights of naturalized citizens and have been vigilant in upholding the doctrine of the equality before the law of all citizens, irrespective of national origin. In *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824), Chief Justice Marshall held that:

> "A naturalized citizen * * * becomes a member of the society, possessing all the rights of a native

[5] For the use of this rule in interpreting the Constitution see *Brown* v. *Maryland*, 25 U. S. 419, 438 (1827) (opinion by Chief Justice Marshall); and *Rhode Island* v. *Massachusetts*, 37 U. S. 657, 722 (1838).

> citizen, and standing in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."

In 1913, faced with the claim that a statute providing for the cancellation of a fraudulent certificate of naturalization unlawfully discriminated between naturalized and native born citizens, the Supreme Court was careful to point out that the section in question "makes no discrimination between the rights of naturalized and native born citizens and does not in anywise affect or disturb rights acquired through lawful naturalization." In the course of the opinion, the Court reaffirmed the Constitutional doctrine by that time deeply imbedded in our law that "Under our Constitution a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility for the Presidency." *Luria* v. *United States*, 231 U. S. 9, 22, 24 (1913). See also *Knauer* v. *United States*, 328 U. S. 654, 658 (1945); *Baumgartner* v. *United States*, 322 U. S. 665, 673 (1944); *United States* v. *Macintosh*, 283 U. S. 605, 623-4 (1931); overruled on other grounds, *Girouard* v. *United States*, 328 U. S. 61, 69 (1946); *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 162 (1892).

(B) English Background

The constitutional principle of equality among all citizens, naturalized and native born alike, was deep rooted in English law prior to the framing of the American Constitution. This same principle was adopted and practiced by the several states between the time of their Declaration of Independence from England and their formation into the United States of America. This was the principle under which the framers of the Constitution lived; this was the principle which they themselves espoused and this was

the principle which they intended to and did embody in the Constitution of the United States.

With respect to English law, Lord Coke, the great English constitutional jurist, laid down the rule that the "alien naturalized to all intents and purposes is as a natural borne subject." *Coke on Littleton*, fols. 129a (1628). Chief Baron Hale in 1664 reiterated that naturalization "put them [aliens] in the condition as if they had been born in England"; "naturalization puts them in the same condition as if born here." *Collingwood and Pace*, 1 Vent. 413, 420, 429, 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664).[6]

In *Regina* v. *Manning*, 2 Carr and K. 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849), C. J. Wilde observed:

> "By Lord Coke, by Lord Bacon, by Sir Matthew Hale, and by, I believe, every text writer, and in all editions of Blackstone by the various learned editors, it is a proposition universally adopted, that a person naturalized becomes to all intents and purposes a British subject."

The single exception to the doctrine of equality of status for naturalized citizens found in our Constitution, that of eligibility to a public office, is significantly the sole exception with respect to equality found in English law. Thus, Blackstone in 1765 stated: "By this [naturalization] an alien is put in exactly the same state as if he had been born in the Kings ligeance; except only that he is incapable • • • of being a member of the privy council or parliament, holding offices, grants, etc." *Blackstone, Commentaries*, Book I, Ch. 10.[7]

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[6] The importance of reference to the common law and to British institutions as they were when the Constitution was framed and adopted in interpreting the Constitution has consistently been recognized by the Supreme Court. See e.g. *Ex parte Grossman*, 267 U. S. 87, 108-109 (1925); *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653-654 (1897); *Ex parte Bain*, 121 U. S. 1, 12 (1886).

[7] For the statutory basis for this distinction, see 12 and 13 W. 3 C. 2 (1700); 7 and 8 Vict. cc. 66 (1844).

(C) Colonial and Constitutional Convention Background

Upon their severance of allegiance from England and their assumption of sovereignty, the several states expressly embraced the English principle of absolute equality between naturalized and native born citizens except with respect to eligibility to public office.

The laws of Virginia gave those who were naturalized all the rights, privileges and advantages of citizens except that they had to meet certain conditions before qualifying for political office. 7 *Laws of Virginia* 19 (1671), 2 *Hening* 289 (1671). The laws of Maryland, Pennsylvania, Massachusetts and Delaware contained similar provisions. See 6 *Laws of Maryland* 2, 5 (1779); *Herty* 377 (1799); 8 *Stats. At Large of Pennsylvania* 337 (1773); 1 *Private and Special Statutes of the Commonwealth of Massachusetts* 1780-1805, 206 (1805); *House Document 326*, 59th Cong. 2d Sess. 8-11 (1906).

> "The effect of naturalization in the several states before the Constitution was adopted was, therefore, to remove alienage, the person naturalized standing in all respects upon the same plane with a natural-born citizen, except that he was under certain removable political disabilities.
>
> The same principle was applied in constructing the Constitution, and in the debates in the Constitutional Convention no one proposed any other principle. Gouverneur Morris said 'he would let them (naturalized citizens) worship at the same alter (with native citizens), but he did not choose to make priests of them' (*Madison's Writings*, IV, 159), and this was the sentiment which finally resulted in the provision that the President must be a natural-born citizen (Art. II, Sec. 1), and that no one shall be a Representative who has not been a citizen for seven years (Art. I, Sec. 2), or a Senator who has not been a citizen for nine years (Art. I, Sec. 3)." *House Document 326, supra*, p. 9.

During the Constitutional Convention debates as to eligibility for Congressional office, Mr. Gerry stated that he

"wished that in the future eligibility might be confined to natives. Foreign powers will intermeddle in our affairs and spare no expense to influence them." IV *Writings of James Madison* (*Putnam's Sons* 1906), p. 172. Colonel Hamilton responded:

> "There was on one side the possible danger that had been suggested. On the other side, the advantage of encouraging foreigners was obvious and admitted. Persons of moderate fortunes will be fond of coming here where they will be on a level with the first class citizens. He moved that the section be so altered to require merely citizenship and inhabitancy." IV *Writings of James Madison, supra*, p. 173-4.

James Madison, the chief draftsman of the Constitution, seconded the motion:

> "He wished to maintain the character of liberality which had been proferred in all the Constitutions and publications of America. He wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity." IV *Writings of James Madison, supra*, p. 174.

Mr. Ghorum observed in this connection that:

> "When foreigners are naturalized it would seem as if they stand on an equal footing with natives." IV *Writings of James Madison, supra*, p. 176.

In response to the argument that the states alone had pledged equality to naturalized citizens, James Madison said:

> "It was said that the United States as such have not pledged their faith to the naturalized foreigners and therefore are not bound. Be it so and that the States alone are bound. Who are to form the new Constitution by which the condition of that class of citizens is to be made worse than the other class? Are not the States ye Agents? * * * Will not the new

Constitution be their Act?" IV *Writings of James Madison, supra,* pp. 176-177.

"We should moreover reduce every State to the dilemma of rejecting it or violating the faith pledged to a part of its citizens." 2 *Farrand, Records of the Federal Convention,* pp. 271-272.

The principle that citizenship by naturalization confers a status in all respects equal to that of citizenship by birth, was, therefore, a principle firmly fixed in the legal background of the delegates to the Constitutional Convention. It was an integral part of that abhorrence of second-class citizenship which led to their own revolt from England. Moreover, as the debates show, there were strong practical reasons why this principal should have been written into the Constitution.

Immigration was vital to the future of the new country,[8] and naturalization was one of the prime incentives to immigration. Any inequality for those achieving their citizenship through naturalization was recognized by the framers as a deterrent to such immigration.

In addition, another chief aim of the Constitutional Convention was to foster unity and harmony among the various states. To empower the Federal Congress, already an object of suspicion in many areas, to derogate from the rights of those who had been naturalized under state laws in the years immediately preceding the Convention would be wholly disruptive of this aim.

Perhaps the most significant evidence that the framers of the Constitution intended to deny Congress the power to make any distinctions between naturalized and natural

[8] The Declaration of Independence cited as a grievance against George III that "[he] has endeavored to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither * * *."

born citizens was their rejection of a draft empowering Congress to "regulate" naturalization. This draft was interpreted by Madison as giving Congress the power to legislate concerning the enjoyment by the naturalized of the various privileges of citizenship. 2 *Farrand, supra,* 144, 167, 235; 4 *Farrand, supra,* 45. Its rejection, coupled with the specific inclusion of a clause distinguishing between naturalized and native born citizens with respect to eligibility to the Presidency, and the grant of a carefully limited power to naturalize show conclusively that the Founding Fathers deliberately determined not to endow Congress with the power to curtail to any extent the rights and privileges of naturalized citizens in comparison with those possessed by the native born.

(D) Views Subsequent to Adoption of Constitution

All statements concerning the status of naturalized citizens in the period immediately after the adoption of the Constitution bear further evidence that the framers of that document viewed Congress' power to naturalize aliens as conferring a status identical to that of the native born citizen, with the sole exception being specifically set forth in the Constitution.

As early as 1812 when the question arose as to English impressment of American seamen, many of whom were naturalized citizens, Secretary of State James Monroe, recognizing the inability of the United States government to discriminate against naturalized citizens, advised the British Minister at Washington:

> "Your proffered exertions to procure the discharge of native American citizens from on board British Ships of war, of which you desire a list has not escaped attention. It is impossible for the United States to discriminate between their native and naturalized citizens, nor ought your Government to expect it as it makes no such discrimination it-

> self." Letter from Monroe to Foster, May 30, 1812, *American State Papers III, Foreign Relations 1787-1828*, 454, 464.

President Madison agreed. He instructed the American Commissioners appointed to conduct the peace negotiations, following the War of 1812 that "By our law, all the rights of natives are given to naturalized citizens." Madison to Binns, February 11, 1813, *Letters and Other Writings of James Madison* (1865) II, 558.

In 1859 Attorney General Black advised President Buchanan that:

> "a native and naturalized American may • • • go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born." 9 *Op. Atty. Gen.* 360 (1858-59).

Attorney General Williams similarly advised President Grant in 1873 that he knew of no principle upon which the rights of natives and naturalized citizens residing abroad could be distinguished. *Foreign Relations of the United States, 1873*, Vol. II, pp. 1216, 1218.

On July 27, 1868, Congress enacted a statute, 15 Stat. 223, Revised Statutes, Sec. 2000, providing:

> "All naturalized citizens of the United States are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."

This legislation was in response to the arrests by the German States of naturalized citizens for non-performance of military service and to the numerous arrests by the English government of naturalized citizens of Irish origin for political offenses. Hundreds of petitions had been sent to Congress from state legislatures and others requesting this enactment. *House Document 326, supra*, pp.

10-11. In the debates which led to the enactment of the Act of 1868, it was frequently acknowledged that naturalized citizens and native born had the same rights.

Congressman Banks of the Committee on Foreign Affairs who presented the legislation declared:

> "* * * the naturalized citizen has exactly the same right in a foreign Government that a native-born citizen of the United States enjoys. There is no difference. There is no privilege for one that the other may not claim, and it is the first and highest duty of the American Government to accord its protection to the naturalized citizen in exactly the same degre that it does to the native-born citizen. And this bill proposes to establish that principle. It is the first time that it has been proposed in the form of a legislative declaration." *Cong. Globe*, 40th Cong., 2d Sess., p. 832.

Congressman Chandler, agreeing, stated:

> "At home or abroad no distinction exists among American citizens according to all established declarations of this Government. There can be no just distinction in law or fact made between citizens of the same Government and certainly no act of Congress should establish such distinction * * *." *Cong. Globe, supra*, p. 1015.

Congressman Woodward was of a like opinion:

> "By naturalization the foreigner becomes an American citizen, except for one or two purposes, as truly as if he was 'native to the mannor born'. And when he returns to his native country, either for business or pleasure, he is entitled to the same measure of protection that any American citizen has the right to claim." *Cong. Globe, supra*, p. 1018.

Thus, it clearly appears that the sources and guides customarily employed in ascertaining the meaning of the Constitution all point to a purpose not to distinguish be-

tween native or naturalized citizens except with regard to very limited classes of political office. The English law, the laws of the various states at the time of the adoption of the Constitution,[9] the necessities which gave birth to the Constitution,[10] the statements contemporaneous with its adoption, the alternate drafts considered and rejected, and the contemporaneous construction following adoption of the Constitution, all point inevitably to the construction which the amicus urges. They establish that the Constitution must be read as stating that Congress shall have power to pass a uniform rule providing the method whereby aljens can achieve a status equal in all respects to the native born but shall have no other power in connection with the status of naturalized citizens. Specifically Congress shall not have power to impose upon such citizens any limitations or burdens which do not apply equally to native born citizens.

The Fourteenth Amendment to the Constitution, the first comprehensive definition of United States citizenship,[11] serves to underscore that there is only one category of "citizens of the United States" whatever may be the origin or the means of attaining such citizenship. That amendment provides "All persons born or naturalized in the United States * * * are citizens of the United States". Section 352 of the Immigration and Nationality Act of 1952 is wholly inconsistent with this definition of a single indistinguishable class of citizens. That statute is

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[9] With respect to state law as an aid in the construction of the Constitution, see: *Waring* v. *Clarke*, 46 U. S. 441, 457 (1847); *Marshall* v. *Gordon*, 243 U. S. 521, 534, 535 (1917).

[10] The importance of the needs a particular provision was designed to meet in interpreting the Constitution is pointed out in *Legal Tender Cases*, 79 U. S. 457, 531 (1870); *Knowlton* v. *Moore*, 178 U. S. 41, 95 (1900).

[11] *Slaughter-House Cases*, 83 U. S. 36, 72 (1873).

based upon the contrary concept, never a part of our history or of our law, that there are two classes of citizens: "native born citizens of the United States" endowed with a preferred status and "naturalized citizens of the United States" forced to accept an inferior position. Such a thesis should be unequivocally repudiated by this Court.

III

The Immigration and Nationality Act's discrimination between native born and naturalized citizens residing abroad is arbitrary and violative of due process.

The severity of our expatriation laws, their necessity and their discrimination between native born and naturalized citizens may be compared with the requirements of other countries throughout the world. In this connection, it should be remembered that these countries are not restricted by the same constitutional limitations as is the United States.

Of eighty-four countries examined (see Laws Concerning Nationality, United Nations Legislative Series, 1954), only nineteen were found which expatriate for foreign residence. Four countries, Czechoslovakia, Hungary, Pakistan and Yugoslavia, make no distinction between naturalized and native born citizens. Illegal departure may result in expatriation in the first two countries; residence abroad for seven and five years, respectively, without registration expatriate in the other two. Australia, South Africa, and the United Kingdom provide for the expatriation of naturalized citizens remaining abroad for seven years without registration. Seven years' foreign residence may expatriate in Thailand. Israel, Costa Rica, and Nicaragua use seven, six, and five years respectively, but all three require an absence of connections with the country. Canada uses six years' residence abroad with the right to grant

extensions, Ceylon employs five years, Cuba three years without registration, Guatemala two years, Mexico five years in the country of origin, and New Zealand six years with a requirement that expatriation be conducive to the public welfare. In El Salvador residence in the country of origin for two years and in other foreign countries for five years without permission results in loss of nationality by a naturalized citizen. In Liberia similar periods bring about a presumption of loss of citizenship.

We submit, therefore, that our expatriation laws rank high as the most severe and unyielding in the world.

Congress has established a crazy patch quilt of favoritism and discrimination between naturalized citizens residing abroad.

1. Naturalized Americans who acquired naturalization as a result of acquisition of territories or possessions through treaties or acts of Congress are given the same rights of residing abroad as native born citizens. 8 U. S. C. 1485(10).

2. Naturalized citizens who were native born and who were expatriated by marriage to an alien and then reacquired citizenship are likewise given full freedom to reside abroad. 8 U. S. C. 1485(9).

3. Veterans of the Spanish American War or World War I residing abroad in their native land on December 24, 1952, are granted the right to continue such residence. They and all other war veterans have freedom to reside indefinitely in foreign countries other than those of their former nationality. 8 U. S. C. 1486.

4. Naturalized Americans who resided in the United States for ten years during minority and who have a native born spouse or child may reside abroad indefinitely with them. 8 U. S. C. 1485(8).

5. Naturalized Americans sixty years old who resided in the United States for twenty-five years after naturalization are free to reside abroad. 8 U. S. C. 1485(3).

6. Governmental employment, Governmental compensation, business reasons and ill health likewise furnish bases for exemption from foreign residence bans. 8 U. S. C. 1485(1, 2, 4, 5).

These exemptions, except for those based upon Governmental employment, commercial, religious, or educational grounds, were not based upon foreign policy considerations. The possibility of international friction did not preclude exemptions for naturalized citizens from acquired territories, for repatriated women, for veterans, nor for naturalized citizens with ten years residence during minority. Obviously these groups were granted favored treatment because of personal backgrounds. Humanitarian motives have given the sixty year old naturalized citizen the benefit of an exemption. *Hearings on H.R. 6127, superseded by H.R. 9980, supra*, p. 502. We, therefore, question whether the classifications herein can be sustained upon a foreign policy argument.

The distinctions of the expatriation laws should be appraised in the light of the reasons advanced for the legislation here under attack. Historically, our greatest problem has been the involvement with foreign governments who have impressed Americans residing abroad into their military service, who have punished them for non-performance of military duties. We have had this problem, as in the War of 1812, with regard to native born Americans and since that time with native Americans with dual nationality. *III Hackworth, supra*, pp. 352, *et seq.* We have never had this problem with regard to women.

The bar against foreign residence, however, is applied equally to men and women and regardless whether or not they are liable to military conscription abroad. The bar

is not applied to dual nationals who take an oath of allegiance to the United States (8 U. S. C. 1482) even though their presence abroad may result in conscription. The solution to the international conflicts on military service has been sought and found to a large degree in treaties. *III Hackworth, supra*, pp. 377, *et seq.* Treaties removed the problem originally presented by Great Britain's claim of perpetual allegiance and it removed the difficulties experienced at one time with Prussia. If there is in fact a problem created by the foreign residence of naturalized citizens, the solution lies in the negotiation of treaties with foreign governments to resolve the rights of United States citizens, rather than an arbitrary revocation of citizenship of one class of citizens.

The Committee recommending expatriation of naturalized citizens for foreign residence, itself urged in support of this provision that it would encourage naturalization treaties. Experience does not justify the statute on this ground, for no additional treaty has been prompted by our 1940 or 1952 expatriation laws.

Moreover, the expatriation provisions conflict with most of our treaties which provide for the presumptive loss of citizenship by two—not three years residence in the country of former nationality. See *III Hackworth, supra*, p. 414.

Our expatriation laws were suggested to prevent improper naturalization. Denaturalization laws and proper enforcement of our naturalization requirements are the answer to this situation. 8 U. S. C. 1451(d). Preventing the transmission of citizenship to children born abroad was likewise advanced as a ground for this legislation. However, regulation of these cases is controlled by 8 U. S. C. 1401(a)(7) under which petitioner has already conferred citizenship upon her sons born in Germany. Finally, it is contended that naturalized citizens residing abroad tend to renew "old associations and ways of living and thinking". We submit that this is not a proper subject for the control

of Congress either while the naturalized citizen resides abroad or at home.

Two questions are posed by the problem presented here:

First, is it reasonable for Congress to restrict residence abroad by all citizens merely because of ordinary difficulties encountered by the State Department in protecting their interests while they remain in foreign lands? "The right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law of the Fifth Amendment. * * * 'Our nation' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases'." *Kent, et al.* v. *Dulles*, 357 U. S. 116, 125, 126 (1957).

In *Perez* v. *Brownell*, 356 U. S. 44, 58 (1957), this Court stated:

> "Since Congress may not act arbitrarily a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs."

It must, therefore, be conceded that citizens of the United States may not be denied residence abroad capriciously.

Second, is the denial of residence abroad based upon arbitrary grounds? Is the classification between native born and certain types (but not all) of naturalized citizens arbitrary?

The Government admits in its Memorandum filed in response to the Petition for Certiorari herein that varying treatment of different groups may be upheld, "upon a showing that the classification was reasonably devised to meet a demonstrated need". The demonstrated need is said to be the greater *possibility* that residence abroad by

naturalized citizens would produce international disputes (pp. 11, 12).

The classification is based upon place of birth and is applied only to some not so favored naturalized citizens. Such a classification should have compelling basis to withstand constitutional attack. As this Court stated in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943):

> "Distinction between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Judge Edgerton, dissenting, observed in the same vein that:

> "Distinction because of birthplace are equally arbitrary." *Lapides* v. *Clark*, 176 F. 2d 619, 623 (C. A. D. C., 1949).

Four criteria usually applied in determining the reasonableness of a classification are (1) the deprivation involved; (2) the conditions existing prior to the legislation; (3) the possibility of achieving the same benefits at a lower price; and (4) effectiveness of the new legislation to improve conditions. *The Consideration of Facts in "Due Process Cases"*, 30 Col. L. Rev. 360 (1930). An analysis based upon these criteria demonstrates the utter constitutional failure of Section 352 of the Immigration and Nationality Act of 1952.

1. *The Deprivation Involved.* This Court has referred to the right of American citizenship as "no less precious than life or liberty, indeed * * * one which today comprehends those rights and almost all others." *Klapprott* v. *United States*, 335 U. S. 601, 616 (1949). American citizenship has also been called "the highest hope of civilized men." *Schneiderman* v. *United States*, 320 U. S. 118, 122 (1943); and "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922).

Loss of citizenship is particularly important where it results not only in loss of certain civil and constitutional rights, but in the infinitely greater penalty of exile and banishment from the United States. This is the effect of Section 352. The individual deprived of citizenship by that section, since he is already outside the United States and not permitted to return, loses in one fell swoop all rights, advantages and opportunities possessed by those living in the United States whether they be citizen or alien. Even the sponsors of the present legislation acknowledged that it "may appear to be somewhat drastic." *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, p. 495.

2. *Conditions Existing Prior to the Legislation.* Where such basic rights and principles are at stake an affirmative showing must be made that a reasonable need exists for the statute in question. This means that in order to justify Section 352 and assuming for the purposes of argument only that naturalized citizens may be treated differently from native born, it must be shown that there is a reasonable need for the discriminatory classification. Was there a reasonable need to prevent the residence abroad in lands of former nationality of naturalized American women, like petitioner? Every one of the thirteen cases cited by the State Department as illustrating the need for the legislation herein involved a male citizen. *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, pp. 497-501. Nor do the cases reveal the pendency of any international disputes caused by foreign residence. The foreign conflicts of an earlier era over military conscription of our male citizens had been solved by naturalization treaties. Such foreign conflicts never had related to American women. Moreover, the legislative history here does not explain the details of any alleged international complications with any named countries. On the contrary, it only speaks of "difficulties and embarrassment to the Government of the United States"; *Ibid.*, p. 495. Specificity is lacking. Finally, as we observed, *supra*, discrimination and favoritism between

naturalized citizens residing abroad are not based upon foreign policy considerations. We, therefore, submit that conditions existing at the time this legislation was enacted did not call for the invocation of our power to regulate foreign affairs by terminating the citizenship of naturalized Americans.

3. *The Possibility of Achieving the Same Benefits at a Lower Price.* Before Congress may pass and this Court sanction legislation which is so serious an invasion of individual rights and so great a perversion of the traditional principle of the equality of all citizens, it is incumbent upon them to consider the alternative means already available to combat the alleged "evil" sought to be remedied. *Schneider* v. *Irvington*, 308 U. S. 147, 162 (1939); *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5 (1937). See also *Thomas* v. *Collins*, 323 U. S. 516, 532 (1944); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1939).

In the case of the legislation at bar ample means exist to prevent the prolonged residence of naturalized citizens abroad from resulting in international complications. As the then Chief of the Passport Division pointed out in 1950, after criticizing the present stringent legal requirements imposed on naturalized citizens abroad, "The Secretary of State always has the power to withdraw American protection from any native or naturalized citizens whose actions abroad are inimical to the best interests of the United States." See statement of Mrs. Ruth B. Shipley, *supra*. Such was the course pursued for over one hundred years prior to the present enactment.

With respect to those persons whose prolonged residence abroad follows so soon after American naturalization as to create a presumption that naturalization was not obtained in good faith, denaturalization proceedings may be instituted and the naturalization certificate canceled under 8 U. S. C. 1451(d). Strict enforcement of our natu-

ralization requirements—a situation presently in existence—has prevented the grant of acquired citizenship to *mala fide* applicants.

The transmission of citizenship by naturalized persons residing abroad has likewise been controlled by other sections of the law. A naturalized citizen married to an alien, as in petitioner's case, cannot transmit citizenship unless he has been physically present in the United States for ten years, at least five of which were after attaining the age of fourteen years. 8 U. S. C. 1401(a)(7).

Finally, as we have stated before, the legislation here under attack was neither needed for, nor did it ever bring about, the execution of a single treaty.

Thus it can be seen that the discrimination worked by Section 352 is unreasonable not only because the evil it was designed to remedy has been shown to be hypothetical but because that evil even if it became a reality could be adequately met by other legislation already in existence. "The people through their legislatures may protect themselves against * * * abuse *. * *. The legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5 (1937).

Analysis having revealed a complete absence of abuse in the instant situation and having indicated ample safeguards against such abuse should it arise, the alleged "legislative justification" relied on to uphold the constitutionality of Section 352 disappears.

4. *Effectiveness of Legislation to Improve Conditions.* Ruth Shipley, former Chief of the Passport Division, has advised us of the injustices caused by the present legislation. There has been no showing whatever that the discrimination which it imposes upon naturalized citizens has in any way lessened international friction. Absent such a showing, even were the discrimination within the constitutional power of Congress, it must be held unwarranted.

CONCLUSION

Section 352 has been revealed as arbitrary and discriminatory legislation which strikes at one of the basic tenets of our republic—the equality of naturalized and native born citizens. It should be invalidated as unconstitutional legislation.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State,
Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

No opinions were issued by the courts below. The District Court without an opinion entered an Order and Judgment on August 17, 1960 (R. 28) granting respondent's motion for judgment on the pleading and dismissing the complaint. The United States Court of Appeals for the District of Columbia Circuit issued a judgment on May 11, 1962 (R. 29) affirming the judgment of the District Court.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 14, 1962 (R. 29)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Certiorari was granted by this Court on October 15, 1962 (R. 30).

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived petitioner of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, Section 8, Clause 4 of the Constitution provides

> "The Congress shall have Power . . . To establish an uniform Rule of Naturalization. . . ."

The Fifth Amendment to the Constitution provides in pertinent part

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

> "Loss of nationality by naturalized national
>
> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> "(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.
>
> "(b) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 of this title shall not be counted in computing quantum of residence.

"(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 and 354 of this title shall not be counted in computing quantum of residence."

Section 101 of the Immigration and Nationality Act of 1952, 66 Stat. 166, § 101(a)33, 8 U.S.C. § 101(a)33 reads as follows:

"The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

The text of other relevant provisions of the Immigration and Nationality Act of 1952, Sections 353, 354, 356 and also 349 are attached to this brief as an appendix.

STATEMENT OF THE CASE

Petitioner was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (R. 2, 9, 20).

Petitioner lived in the United States continuously from 1939 to 1954 -from age five to age twenty-five.

She was educated at grade school at Croton-on-Hudson, New York, in high school at Cornwall-on-Hudson, New York, and Flushing, Queens, New York, and at Smith College in Northampton, Massachusetts, where she was graduated in 1954 with the degree of Bachelor of Arts. Thereafter, she studied at the University of Berne in Switzerland from 1954 to 1955 on a scholarship given by the Institute of International Relations in New York; and in the following year was a full-time student at the Sorbonne in Paris. She returned to the United States in April 1956, took up residence in Nutley, New Jersey and was employed in New York City (R. 2, 9-10, 20).

On June 6, 1956, petitioner left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom petitioner had become engaged while studying in Paris. Since that time, petitioner lived continuously with her husband in the Federal Republic of Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957 (R. 2, 3, 10, 20-21)

The two sons born to petitioner, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (R. 3, 10, 21).

During all the time of her residence in Germany until June 1959, petitioner was in possession of a valid United States passport. In June 1959, however, the United States Consulate in Dusseldorf refused to grant petitioner an extension of her passport contending that petitioner had lost her United States citizenship. In September 1959, petitioner was requested by the Amer-

ican Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, petitioner was served with a "Certificate of Loss of Nationality of the United States" (R. 3, 10-12, 21-23).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed by letter of January 20, 1960, the previous administrative decision that petitioner had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving petitioner without further administrative remedy. Pursuant to this ruling petitioner is now being denied all rights and privileges of United States citizenship, including a United States passport (R. 12, 23).

Petitioner is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (R. 1-2, 4, 7, 8-9).

Petitioner feels herself to be an American. She feels no political connection with Germany or its Government and has no political loyalty or allegiance to that country. Although she could acquire German citizenship because of her marriage to a German citizen she has not done so. She desires both to continue to be an American citizen and to remain with her husband and children in Germany, where her husband practices his profession (R. 4, 7-9, 12).

Prior Proceedings

On February 1, 1960, petitioner filed a complaint in the District Court for the District of Columbia alleging that Section 352, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States, and seeking a declaration that petitioner is a citizen of the United States as well as certain other relief (R. 1).

On August 17, 1960, the District Court entered an Order and Judgment (R. 28) denying petitioner's motion for summary judgment and granting respondent's motion for judgment on the pleadings, and dismissing the complaint. The Order and Judgment of the District Court recited that "Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States" (R. 28).

Petitioner took a timely appeal to the United States Court of Appeals for the District of Columbia Circuit (R. 29).

On March 24, 1961, after the case had been fully briefed and oral argument held, the Court of Appeals *sua sponte* postponed its decision in this matter pending decision by this Court of *Rusk* v. *Cort*, No. 20, October Term 1961, because, as it now appears, of the similarity of the jurisdictional issue involved.[1]

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[1] On April 25, 1962 the Court of Appeals denied a motion by petitioner asking the Court either to decide the case promptly or to certify the matter to this Court.

Petitioner, thereupon, on May 12, 1961, filed a petition for a writ of certiorari, asking this Court to review this case *prior to judgment in the Court of Appeals*. The writ was denied on June 20, 1961, No. 963, October Term, 1960.

On May 11, 1962 after this Court had upheld the right of the respondent in *Rusk* v. *Cort*, U.S. , 7 L. ed. 809, to challenge by declaratory judgment the denial of his United States citizenship while residing abroad, the Court of Appeals entered an order (R. 29) affirming the judgment of the District Court dismissing the petitioner's complaint on the merits "on the authority of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F.2d 619 (1949)." (R. 30).

On October 15, 1962 this Court granted a writ of certiorari (R. 30).

SUMMARY OF ARGUMENT

I

Section 352 arbitrarily discriminates against naturalized citizens in violation of the Fifth Amendment's guarantee of due process. The discriminatory and arbitrary denial of citizenship to one class of American violates the Fifth Amendment's prohibition of depriving any person of life, liberty or property without due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1953).

A. The discrimination here attempts to take away the right of citizenship in the United States from a person loyal to the United States, and bearing it allegience merely because she is living abroad with her husband—a fact not a ground for revocation of the citizenship of a native-born citizen.

B. The citizenship sought to be taken away was acquired in good faith and the events occasioning her marriage and residence abroad were not contemplated at the time of petitioner's naturalization.

C. The Fifth Amendment prohibits the discrimination between native-born and naturalized citizens in their freedom to reside abroad.

(1) The discrimination seeks to deprive petitioner of a fundamental personal right entitled to special protection under the constitution. *Perez* v. *Brownell*, 356 U.S. 44.

(2) The discrimination is contrary to the often reiterated equality of born and naturalized citizens under the constitution. See *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-828.

(3) The legislation in question is novel in that it takes away citizenship without regard to intent to abandon citizenship. Previous legislation dealing with residence abroad by naturalized citizens was limited to a rebuttable presumption designed only to assist in determining actual intent.

(4) The discrimination sought to be imposed is invidious in nature and based on the premise that naturalized citizens as a class are inferior to native-born. This is established not only by the statute itself but by the exemptions which state that only by reason of special activities and special circumstances are naturalized citizens entitled to the same right to retain their citizenship, while residing abroad, as born citizens are by mere virtue of their birth.

(5) The discrimination also involves an unconstitutional assertion of a congressional power to regulate the travel and residence abroad of naturalized citizens while no such regulation of the native-born is attempted. The right to travel abroad (and to stay there) is guaranteed by the Constitution and not subject to general prohibition. *Kent* v. *Dulles*, 357 U.S. 116, 125-126 (1958).

D The discrimination cannot be justified as a proper exercise of the foreign affairs power.

There is no indication in the legislative history or the Government's Memorandum that any problem relating to the foreign affairs of the United States arises from the mere residence abroad of naturalized citizens, different in any way from the residence abroad of native-born citizens. Possible difficulties suggested—e.g., that perhaps the foreign government might not, as it does here, recognize the American citizenship of the naturalized citizen, or that the citizenship of the children of naturalized citizens raised abroad might be an occasion for conflict, are not shown not to be readily resolved by less drastic legislation not applicable to all naturalized citizens residing abroad. Legislation limited in its effect is clearly available to the Congress.

There is no justification for dealing with all naturalized citizens drastically because a few may create problems by their residence abroad. The Congress may apply the drastic remedy of denaturalization only when less drastic measures are not adequate. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349. The measures adopted must be appropriate to the difficulties to be dealt with. Congress cannot arbitrarily say that in the many countries where naturalized Americans are recognized as Americans, they should be deprived of their citizenship because there may be countries where their American citizenship might not be recognized.

Nor can it be said, as the legislative history suggests, that because some naturalized citizens living abroad may have demonstrated lack of allegiance to the United States, that others who have not demonstrated such lack of allegiance and indeed have demonstrated their allegiance, should be cast out from the body

politic of the country to which their allegiance lies. The discrimination embodied in Section 352(a) (1) is arbitrary and unconstitutional under the due process clause.

II

A. Even apart from the discriminatory nature of Section 352, there is no rational nexus between mere residence abroad and any of the evils with which Congress may deal. Mere residence abroad does not provide a rational basis for loss of nationality. Under *Perez* v. *Brownell*, 356 U.S. 44, Congress, under its foreign affairs power, may attach loss of citizenship only to political acts which may reasonably be regarded as indicating a lack of allegiance to this country and allegiance to another. Plainly there is no relationship between mere residence abroad and lack of allegiance to this country. Mere residence abroad is clearly a neutral act irrelevant to the question of allegiance. Nor does mere residence abroad entail political activity in the country of residence.

B. A general restriction on residence abroad also would plainly be an unconstitutional limitation on the right to travel which includes, of course, the right to remain abroad. See *Kent* v. *Dulles*, 357 U.S. 116.

III

Furthermore, the provision of Section 352 imposing loss of citizenship on a naturalized citizen is a penalty constituting a cruel and unusual punishment within the meaning of the Eighth Amendment.

ARGUMENT

I. SECTION 352 ARBITRARILY DISCRIMINATES AGAINST NATURALIZED CITIZENS IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS

This case marks the first time that this Court is presented with a question involving the constitutionality of a statute containing a substantive discrimination between native-born and naturalized citizens of the United States.

The reason that this Court has never had any occasion to rule on any such discrimination in the past is that this is the first and only substantive discrimination between native-born and naturalized citizens Congress has ever attempted. The provision is a new one. It first became part of our law with the passage of the Nationality Act of 1940, 54 Stat. 1170.

The challenged legislation is Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, which purports *automatically* to deprive naturalized citizens of their nationality because of continuous residence in the territory of a foreign state, either the state of origin where the period is three years, or any other foreign state where the period is five years.

No comparable provision applies to native-born citizens. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship.

Sections 353 and 354 of the Act (8 U.S.C. §§ 1485 and 1486) contain a list of exemptions from this discriminatory deprivation of citizenship embodied in Section 352. The exemptions are detailed. They are applied by the Congress as a matter of grace defining whether, as a matter of policy, certain groups of nat-

uralized citizens shall be exempted from the general prohibition of long-time residence abroad applicable to the remaining body of naturalized citizens on pain of loss of citizenship. No such prohibition and no such limitation is applied to their fellow citizens who obtained their citizenship by birth.

It is petitioner's position that the discriminatory and arbitrary denial of citizenship to one class of Americans under Section 352 violates the Fifth Amendment's prohibition against depriving any person of life, liberty or property without due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1953).

The discrimination plainly limits the rights of naturalized citizens to live and work abroad in a way that is not applied to native-born citizens. It creates a second-class citizenship. The statute is an assertion by Congress of the power to control and restrict the rights of one great class of our citizens to live, work and marry where they please, while another broad class of our citizens is free from such restraints. It is an assertion of a right which, if sustained, cannot be limited by the present scope of the statute and its exemptions. It is, in substance, a claim of right on the part of the Congress to say to naturalized citizens that they have no right to travel or remain outside the borders of the United States except under terms and conditions which Congress, as a matter of grace, may allow, while no such limitation is made on their fellow citizens who owe their citizenship to birth.[2] This dis-

[2] One irony of the terms and conditions presently in force is that the plaintiff, by reason of her more than 15 years residence in the United States, was free to marry and live abroad without loss of citizenship provided it was not in Germany. See 73 Stat. 274, 8 U.S.C.A. § 1486(5), exempting 15-year residents from the

crimination cannot be squared with the Fifth Amendment of the Constitution.

A. The Discrimination as It Affects Petitioner

If petitioner were a native-born citizen, she would be perfectly free to live abroad with her husband without losing her citizenship. However, if the challenged legislation is valid, Angelika Schneider, as a naturalized citizen, after a period of three years residence abroad must choose between giving up her American citizenship or abandoning her marital obligation to stay with her husband at his foreign residence.

A native-born woman can live with her husband abroad and yet retain her American citizenship simply because she desires to retain her identity as an American. Angelika Schneider, as a naturalized citizen, under the statute, is automatically stripped of her American citizenship contrary to her intentions, her feelings and her political allegiance.

Petitioner came to the United States when she was not quite five years of age (R. 2, 9, 20). She attended grade school and high school in suburbs of New York,

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5-year limitation on residence in countries other than the country of birth but not from the 3-year limitation on residence in the country of origin. Had plaintiff married an Austrian, a Swiss, or even a resident of Communist China, she could have lived with her husband in any of these countries secure in her American citizenship for life.

We do not here quarrel with the line which Congress has chosen to draw, however absurd it may seem on its face. We use it only to emphasize that in asserting the power to draw any line based on residence abroad, Congress is asserting a general power to restrict or forbid travel or residence abroad and that its exemption or failure to exempt from the penalty of loss of citizenship is solely a matter of grace.

and obtained her college education at Smith College (R. 2, 9-10, 20). As a natural result of her education in the American schools and spending the years of her principal development in the United States, petitioner is thoroughly American, and is attached to the United States. She is familiar with our system of constitutional government and personal rights, and any other government is necessarily foreign to her. She "regards" herself "as an American, and has no political loyalty or allegiance to either Germany or any other country except the United States." (R. 9). Her affidavit in these proceedings shows why she regards herself as an American and why she desires to retain her citizenship with the only country which has her allegiance. We quote:

> "4. I feel myself an American and I value my American citizenship highly. Practically all my relatives, except my husband and children, live in the United States and are American citizens. These include two brothers, a half brother and sister. (R. 7-8).
>
> "5. I regard the United States as my country. I have had all my schooling (grade school, high school and college) in the United States except for some post-graduate work in Switzerland and France." (R. 8)
>
> * * *
>
> "8. I regard myself as an American. I have spent my entire childhood and youth in the United States and regard it as my country. From the time I was five until I came to Germany in 1956 to be married, I had been in Germany only briefly in 1954 and 1955 travelling through and have neither felt nor had any connection with that country. I have no political loyalty or allegiance

to either Germany or any other country except the United States." (R. 9)

* * * *

"6. I am advised by the Department of State that I am no longer an American citizen and am not entitled to passport and nationality privileges as an American because I am married to a German citizen and living with him and our children in Germany where he resides and works. I am told that I have lost my citizenship because the country in which I live and in which my husband lives and works happens to be the one where I was born. I am also told that if I had married a resident of any other country and gone to live with him and raise children in the country where he lived and worked, I would not lose my American citizenship. Moreover, if I had been born rather than naturalized an American citizen I would also be able to conduct a normal family life with my husband in Germany. Instead, as a result of the action of the State Department in taking away my passport and my naturalization certificate, I am faced with a choice of giving up my husband and family life with him, or of being forced to give up my country. I do not wish to accept either alternative. I wish to be an American citizen which I feel myself to be and also to remain with my husband and our children in Germany where he practices his profession." (R. 6)

* * *

"22. I understand that the statutes involved apparently require the results reached by the State Department. I cannot believe, however, that the Constitution of the United States permits me to be faced with the cruel choice of surrendering either my family or my country. I have, accordingly, directed the institution of the necessary proceedings to establish what I believe to be the true and just conclusion that I, although natural-

ized, have the same freedom as any American girl who received her citizenship by birth to marry where I please and to live with my husband and family without giving up my American citizenship." (R. 12)

There is nothing to distinguish petitioner from any other American girl who resides with her husband abroad except the fact of her birth in Germany. Under Section 352, however, this fact alone operates automatically to deprive petitioner of her American citizenship.

Because of this provision petitioner now lives in Germany as a stateless person (R. 8). After having been raised here and under our institutions, she finds herself abandoned by her country, and subject to the mercy of governments in Germany or elsewhere, wherever she may be, whom she regards as alien.

B. The Discriminatory Statute Takes Away Citizenship Validly Secured in Good Faith With the Intent to Reside Permanently in the United States

Section 352 operates to take away American citizenship acquired in good faith with the required intention to reside permanently in the United States. It is applicable independently of the good faith of the naturalization and applies to all naturalized citizens irrespective of their intentions at the time of naturalization. It does not purport to challenge and relate back to the original naturalization. Instead it proceeds on the theory that a validly naturalized citizen can be deprived of his citizenship, if he takes up foreign residence many years after naturalization and on account of circumstances completely unforeseeable at the time of naturalization. This is plainly demonstrated by the

present case. There is in this case no question of petitioner's bona fide intention to reside permanently in the United States at the time of her acquisition of citizenship, nor has the Government so suggested. Petitioner was naturalized in 1950 at the age of sixteen, having resided in the United States since 1939 (R. 9, 20). At the time she acquired her citizenship she had just graduated from high school and was beginning her freshman year at Smith college (R. 9). She could not have known or suspected that years later she would meet and marry Dr. Schneider and live with him in Germany.

Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as an attack on the original naturalization, it would clearly be arbitrary. *Cf. Bailey* v. *Alabama*, 219 U.S. 219; *Tot* v. *United States*, 319 U.S. 463 (1943); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

The entirely different problem of the alien who acquires American citizenship with no intention to make the United States his home, but only for the purpose of receiving the advantages of an American passport or American diplomatic protection is adequately covered by another provision of the Act.

Section 340(d) of the Immigration and Nationalization Act of 1952, 8 U.S.C. § 1451(d), meets this problem by establishing a rebuttable presumption that a naturalized citizen who, within five years of his naturalization, returns to his country of origin, or goes to any other foreign country, lacked the required intention to reside permanently in the United States at the time he applied for naturalization. If this presumption is not

rebutted the naturalization may be set aside as having been acquired by fraud.*

This Court in *Luria* v. *United States*, 231 U.S. 9 (1913) sustained this provision, as embodied in an earlier Act, as a proper exercise of the naturalization power. This Court warned, however, this presumption, if unreasonably applied, could deprive naturalized citizens of their constitutional rights. In *Luria* this Court stated, 231 U.S. at 27:

> "* * * But we are of the opinion as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to acquire but slight countervailing evidence to overcome it . . . So construed we think the provision is not an excess of the power of Congress."

Section 352, since it operates to deprive validly naturalized citizens of their citizenship and does not challenge or relate back to the original naturalization,

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*Section 340(d), 8 U.S.C. § 1451(d), reads in pertinent part as follows:

> "If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . . ."

cannot, as was the presumption in *Luria*, be sustained as a proper exercise of naturalization power. Nor did the Government so contend in its Memorandum on Certiorari.[4]

Article 1, Section 8, Clause 4 of the Constitution which grants Congress the power "to establish a uniform Rule of Naturalization" gives Congress the power to confer, but not the power to take away citizenships validly acquired. As this Court noted in

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[4] While the Government has not attempted to sustain Section 352 as an exercise of the naturalization power the legislative history of the 1940 Act indicates that the provisions now contained in Section 352 were erroneously sought to be justified as a proper exercise of the naturalization power designed to expatriate person who acquired United States citizenship without ever having had the required intention to reside permanently in the United States.

Thus, for example, the Cabinet Committee with recommended passage of the Act observed:

> "Admission of an alien to the privilege of American citizenship is subject to the condition that he intend to reside permanently in the United States and perform the duty of a citizen. When a naturalized citizen abandons his residence in the United States and takes upon residence in the state of which he was formerly a native definite termination of his American citizenship should follow." (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 511-512 (1940)).

Mr. Flournoy, Assistant Legal Advisor of the Department of State similarly stated:

> "I do not know why a person who obtained naturalization upon a statement [under oath that he intends to reside permanently in the United States] should retain citizenship if he goes and lives for some long period even in a third country. Of course, the cases that give us most trouble are those cases of persons who go back to their native land . . ." (*Id.* at 141).

United States v. *Wong Kim Ark*, 169 U.S. 649, 703 (1898):

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. . . . Congress [has] no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress. . . ."

Accordingly, Section 352 plainly represents a discrimination between two classes of persons rightfully citizens of the United States—those who acquired citizenship by birth and those who acquired citizenship through naturalization.

C. The Fifth Amendment Prohibits Discrimination Between Native-Born and Naturalized Citizens in Their Freedom to Reside Abroad

It is well settled that the Fifth Amendment's due process clause, like the Fourteenth Amendment's equal protection clause which applies to the States, forbids the Federal Government to deprive any person of fundamental rights on an arbitrary or discriminatory basis.

> "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law'; and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjusti-

fiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1953).[2]

[2] See also, *e.g.*, *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939); *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

The first question presented in this case is, therefore, whether the discrimination against naturalized citizens found in Section 352, is "so unjustifiable as to be violative of due process."

The burden of justifying this discrimination as reasonable is especially high here. This is because of the following factors which will be discussed at greater length below.

1. The nature of the right involved—citizenship—is one of the most precious of all personal rights.

2. The discrimination is plainly contrary to the principle of equality between native-born and naturalized citizens as expressed in the opinion of this Court throughout its history.

3. The discrimination is without any legislative precedent.

4. The discrimination is invidious in nature in that it is based on the point of view that naturalized citizens *as a class* are inferior to the native-born, thereby relegating the naturalized citizen to a second-class citizenship status.

5. The discrimination represents an unconstitutional assertion of Congressional power to regulate, in its discretion, the travel and residence abroad of naturalized citizens, while no such regulation of the native-born is attempted.

1. The Discrimination Involves a Vital Personal Right

The discrimination in the statute involves not a mere regulation of business, but affects a most fundamental individual right, the right of citizenship. This Court has often recognized that citizenship is perhaps the most precious of all individual rights. *Perez* v. *Brownell*, 356 U.S. 44 (1958); *Trop* v. *Dulles*, 356 U.S. 86 (1958); *Knauer* v. *United States*, 328 U.S. 654, 659 (1946); *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). Loss of citizenship where, as here, it results in statelessness means that the individual has no right to protection whatsoever, and that his right to live anywhere is at the mere sufferance of the state at whose borders he may happen to be.

Where discrimination involves such a vital individual right, the burden of justifying the discrimination as reasonable is substantially higher than in the case of classifications affecting interests constitutionally less important, such as laws dealing with the regulation of business matters. See *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638-639.

2. The Discrimination Is Contrary to Established Legal Principles

The discrimination in Section 352 is plainly contrary to the deeply rooted principle of equality between the native-born and naturalized citizens as expressed in the opinions of this Court.

The classic formulation of this principle is found in the opinion of Chief Justice Marshall in *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-828 (1824):

> "A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not

proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might use. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none."

Nearly a century later this Court said in *Luria* v. *United States*, 231 U.S. 9, 21 (1913)

> "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save only that of eligibility to the presidency."

For similar but more recent statements, see also *United States* v. *MacIntosh*, 283 U.S. 605, 624 (1931); *Knauer* v. *United States*, 328 U.S. 654, 658 (1946).[5]

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[5] See also the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U.S. 44, 56, where he states:

> ". . . of course, naturalization unlawfully procured may be set aside. But apart from this circumstance the status of the naturalized citizens is secure."

And the concurring opinion of Mr. Justice Douglas in *United States* v. *Minker*, 350 U.S. 179, 197:

> "The citizenship of naturalized persons has the same dignity and status as the citizenship of those born here, save only for eligibility for the Presidency."

The Constitution neither makes nor permits Congress to make any other exception; and specifically provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside:"[6]

3. The Discrimination Is Without Legislative Precedent

There is no precedent in prior legislation for the discrimination between native-born and naturalized citizens.

This discrimination, which first became part of our law with the passage of the Nationality Act of 1940, is the *first* and *only* discrimination between native-born and naturalized that Congress has ever attempted. It is the single substantive exception to the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the Presidency of the United States to the native-born.) See *Luria* v. *United States*, *supra*, 231 U.S. 9, 21.

A prior distinction between native-born and naturalized citizens appears in the Act of March 2, 1907, 34 Stat. 1228, but it was a procedural not a substantive one.[7] The 1907 Act provided that if a naturalized

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[6] Amend. 14, Section 1 of the Fourteenth Amendment, as proposed, omitted the words "or naturalized". These words were added on motion of Senator Fessenden, and there is no record of any dissent in the Reconstruction Congress. Congressional Globe, 39th Cong., 1st Sess., Pt. 4, p. 3040 (June 8, 1866).

[7] Act of March 2, 1907, 34 Stat. 1228:

"Sec. 2.

. . . .

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any

citizen resided for two years in a foreign state from which he came or five years in another foreign state, a presumption would arise that he had voluntarily abandoned his citizenship. Under this statute such a presumption could be overcome "by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." It was, as this Court stated in *United States* v. *Gay*, 264 U.S. 353, 358 (1924), "a presumption easy to preclude, and easy to overcome. It is a matter of option and intent." This Act was nothing more than a requirement to state clearly an intention to continue allegiance to the United States. Furthermore, even in a case where the presumption should prevail, the effect, according to a ruling made by Attorney General Wickersham, 28 Op. Attny. Gen. 504 (1910), was only loss of diplomatic protection and not an actual loss of citizenship. Indeed, the Act had no application to a citizen who returned to the United States no matter how long he had stayed abroad. *Ibid.*

Thus the 1907 Act provided only a yardstick for voluntary and intentional expatriation. It imposed on the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not deprive loyal American citizens of their citizenship on grounds of mere residence abroad. *United States* v. *Gay, supra.* See also

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other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided*, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State many prescribe; *And provided also*, that no American citizen shall be allowed to expatriate himself when this country is at war."

Miller v. *Sinjen*, 289 F. 388 (8th Cir. 1923); *Camarado* v. *Tillinghast*, 29 F.2d 527 (1st Cir. 1928); *United States* v. *Eliasen*, 11 F.2d 785 (W.D. Wash. 1926).

In 1940, Congress in its new Nationality Act *for the first time* provided for involuntary or automatic loss of citizenship as a consequence of certain actions. 54 Stat. 1137. Section 404 of that Act provided flatly that naturalized citizens should automatically lose their citizenship after a sojourn of a certain period abroad; the present Section 352 is substantially similar to Section 404.[8]

Aside from the constitutional provision as to the presidency, Section 352 is the only provision in the 1952 Act as well as in the rest of our law which discriminates between native-born and naturalized citizens.

Thus, the discrimination in Section 352 cannot be justified on the basis of any long-established historical tradition. Justification, if any, must be based on the existing powers of Congress to deal with present-day problems.

4. The Discrimination Is Invidious in Its Nature

The discrimination embodied in Section 352 proceeds from the point of view that naturalized citizens *as a class* represent an inferior group of citizens, less loyal and less reliable than the native-born. In the words of the Report of the President's Commission on Immigration and Naturalization, *Whom We Shall Welcome*, 1953:

[8] Section 352 omits the provision of Section 404(a) terminating citizenship at an earlier date where an American residing abroad acquires foreign citizenship, which can now be found in Section 349(a)(1) of the present Act.

> "These provisions for loss of nationality, limited to naturalized citizens, create a *second-class citizen status.*" [Emphasis added][9]

For these reasons we submit that the discrimination in Section 352 is violative of the Fifth Amendment, even assuming *arguendo* that it could be rationally justified as tending to assist some legitimate congressional objectives. Classifications of citizens on the basis of birth or national origin "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and are suspect even when justified by the most extreme wartime emergency. *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

It is plaintiff's position that under no circumstances can Congress make, by a general law applicable in times of peace as well as emergency, invidious discriminations between citizens which result in the creation of "second-class citizenship" for some. Yet this is the unequivocal result of Section 352.

It is, of course, always possible for a law to distinguish between people on a basis that is not invidious. The tax laws treat married men differently from single men and persons over 65 differently from younger people, yet these distinctions are not invidious; nothing in the law suggests that a person in one of these categories is in any way inferior to persons in the other category. Section 352, however, presupposes inferiority on the part of naturalized citizens.

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[9] The Commission was established by President Truman at the urging of religious leaders. Its member were Thomas G. Finucane, Adrian S. Fisher, Rev. Thaddeus F. Gullixson, Msgr. John O'Grady, Clarence E. Pickett, Earl G. Harrison, and Philip B. Perlman, Chairman. The Executive Director was Harry N. Rosenfield.

Curiously enough, the exemptions which, to a very limited extent, have softened the broad sweep of Section 352, indicate perhaps better than anything else that these provisions presuppose an inferior status on the part of naturalized citizens.

For example, Section 354 (5) provides that Section 352 (a) (2) shall not apply to a naturalized American:

> "who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence. * * *"[10]

In introducing this exception Congressman Walter said (98 Congressional Record 4313, April 23, 1952):

> "Mr. Chairman, the purpose of this amendment is to preserve the citizenship of any naturalized citizen who has lived in the United States for 25 years and thereafter obtains employment or goes to some other country for business purposes. If he goes to the country of which he was a national, at the end of three years he would lose his citizenship. If he goes to a third country, at the end of five years he would lose his citizenship. *It is the opinion of the committee that after having resided in the United States for 25 years a citizen who has been a naturalized citizen for that period of time should be permitted to stay wherever his business requires him* for a period in excess of the 3- and 5-year periods." (Emphasis supplied).

Congressman Walter thus made clear that a naturalized American by twenty-five years' residence here could earn a permission "to stay wherever his business requires him," which a native-born citizen could obtain

[10] Prior to the amendment of Section 354(5), 73 Stat. 274, the period was twenty-five years.

without a single day's residence. A native-born citizen has apparently a conceded right without limitation "to stay wherever his business requires him" whereas a naturalized citizen must remain here for twenty-five years before he is granted, as a matter of grace, similar freedom. Clearly, by this discrimination the naturalized American has been consigned to the status of a second-class citizen.

The exceptions to Section 352 contain many other invidious discriminations. For example, Section 354 (1) makes an exception for any person who is a veteran of the Spanish-American War, World War I, World War II or the Korean War. Service in the armed forces of course entitles the naturalized citizen to some reward or recognition for his service to this country. But the privilege, the reward or recognition, is something which his fellow citizens who were born here obtain as a right without having earned it. Indeed it cannot be taken away from them even if they have been guilty of the greatest disservice to the nation in time of need. *Trop* v. *Dulles*, 356 U.S. 86 (1958). Here again the naturalized American who has met the statutory requirements for naturalization is placed in an inferior category from which he may escape and be given rights equal to that of the native-born only as a special reward.

Similarly, Section 353(2) provides that Section 352 shall not apply to a naturalized American who

> "is receiving compensation from the Government of the United States and has his residence abroad on account of disability in its service. . . ."

It should be noted that the individual need not be *employed* by the United States. He may, for example, be on a pension. Thus the naturalized American who

has incurred disability in the service of his adopted country is rewarded by being treated as a better, more reliable American than other naturalized citizens and the equal, by grace of Congress, of his native-born fellow citizen.

Section 354(2) contains an exception for persons doing work abroad which "in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce." This provision also asks the naturalized American to bear burdens of establishing special merit—this time to the satisfaction of a government official—before he can keep his citizenship while abroad, whereas the native-born American can do any work he pleases abroad (whether or not the Secretary of State thinks it will benefit the United States) without incurring this penalty. By attempting to regulate the kind of work that the naturalized American may carry on abroad by the standard of benefit to the United States, the law once more demonstrates the basic relegation of naturalized Americans to an inferior status. And by subjecting naturalized citizens to surveillance of the Secretary of State, who has no jurisdiction of activities of the native-born citizen abroad, the Act treats the naturalized citizen more like a parolee than like a full-fledged American. The whole process is inconsistent with a democracy, particularly America's melting pot democracy, the basic assumption of which is equality of all citizens before the law. See opinions of Mr. Justice Rutledge in *Schneiderman* v. *United States*, 320 U.S. 118, 167 (1943), and *Knauer* v. *United States*, 328 U.S. 654, 677 (1946).[11]

[11] Other discriminations equally invidious appear in other exemptions. For the convenience of the court at the end of this brief we have collected the full text of these exemptive sections.

5. The Discriminatory Provision Is An Assertion By Congress of the Right to Control Travel of Naturalized Citizens

Section 352, especially when viewed together with the exemptions Congress has made in Section 353 and 354, is an assertion on the part of Congress to regulate how long, under what conditions and for what purposes naturalized citizens may remain outside the United States. Congress has asserted the power to permit residence abroad on the part of naturalized citizens for some purposes, and to forbid such residence for other equally legitimate purposes. If Congress has this power at all, it may regulate, as it sees fit, the travel of naturalized Americans and their liberty to work, marry and live abroad. If Congress may keep a naturalized citizen from living more than three years abroad it may cut down this time to one year or even forbid naturalized Americans to reside abroad at any time.

Travel is of course a fundamental aspect of the personal liberty protected by the due process clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116, 125-128 (1958). In *Kent*, this Court stated (357 U.S. at 126):

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . ."

This Court then quoted at length from Professor Chafee's explanation of the extent of that liberty, citing in particular "reasons close to the core of per-

sonal life—*marriage* [illegible] families, spending hours with old friends." (*Ibid.*, emphasis supplied.) And of course we submit there is no basis for distinguishing between the right of the citizen to go abroad, and his right to remain there once he arrives, or to travel further as he pleases, provided of course his objective, e.g., business, family, life, health, pleasure, etc., is not one which Congress has the power to prohibit to naturalized and native-born citizens alike.

The power asserted in Section 352 is in reality the power to require naturalized citizens to remain within the territorial boundaries of the United States or restrict their activities outside those boundaries as to duration or nature. In addition to the fact that, as seen, this great power over the liberty and freedom of naturalized Americans does not apply in any degree to native-born citizens, it is a unconstitutional deprivation of the right to travel protected by the due process clause.

D. The Discrimination Cannot Be Justified As a Proper Exercise of the Foreign Affairs Power

As will be clear from the above discussion dealing with the character and effect of the discrimination in Section 352 between native-born and naturalized citizens, any attempted justification of this provision is impossible.

The Government has taken the position that the discrimination may be justified as a valid exercise of Congress' foreign affairs power.

As we shall demonstrate below, the discrimination is without justification under the foreign affairs power.[12]

[12] Under Point II we shall further establish that Section 352, even if applied to all citizens equally, would, under this Court's ruling in *Perez v. Brownell*, 356 U.S. 44 (1958), be beyond the power of Congress to enact.

The discrimination between native-born and naturalized citizens embodied in Section 352 affects, as we have seen, in a most serious way the personal rights and status of naturalized citizens. It involves the most basic of all rights—citizenship, and subjects naturalized citizens to travel and residence restrictions which are not and could not be imposed on the native-born. The discrimination, unprecedented in our law which up to now, has always considered the naturalized citizen equal to the native-born in all respects with the single exception of the constitutional provision limiting the presidency to the native-born, relegates the naturalized citizens to second-class citizen status solely because of their foreign birth.

To sustain this unprecedented classification affecting basic individual rights as meeting the requirements of due process requires at the very least a showing that this legislation was reasonably required to solve actual national problems. As stated in *Perez* v. *Brownell*, *supra*, 356 U.S. at 58,

> "... the means—in this case withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs."

The burden of justifying legislation affecting such fundamental personal rights as are here involved is substantially higher than where a classification affects interests constitutionally less important. *Bates* v. *City of Little Rock*, *supra*, 361 U.S. at 524; *West Virginia State Board of Education* v. *Barnette*, *supra*, 319 U.S. at 638-639.

Accordingly, to uphold the discrimination as a proper exercise of the foreign affairs powers would require a showing that the mere residence abroad of naturalized

citizens in and of itself raises serious problems affecting the conduct of our foreign affairs, while no similar problems are raised by the residence abroad of native-born citizens; and that withdrawing the citizenship of all naturalized citizens who reside abroad for the stated periods is an appropriate means to resolve such problems. *Perez* v. *Brownell*, *supra*.

The legislative history of the section, as are the papers the Government has submitted in these proceedings, fail to show the existence of any problems created by the mere residence abroad of naturalized citizens as distinguished from the native-born. As we shall see the indicated problems arise not from mere residence abroad but from special and limited circumstances or activities involving a very small number of naturalized citizens residing abroad and not only naturalized citizens. Since there is no suggestion that these special cases could not be appropriately met by more specific and limited legislation, rather than by placing these restrictions on naturalized citizens as a broad class the attempted discrimination is arbitrary, and plainly violative of due process. *Perez* v. *Brownell*, *supra*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, (1951).

The legislative history of the 1940 Act[13] indicates that the Cabinet Committee, which recommended passage of the Act, as well as the State Department, advised Congress in very general terms that problems raised by naturalized citizens residing abroad have been a source of difficulty and embarrassment to the United States. The nature of these problems was not

[13] Congress gave no special consideration to Section 352 when incorporating its provision in the 1952 Act. H. Rep. No. 1365, 82d Cong., 2d Sess.

specified. Reference is only made that they involve the necessity of giving diplomatic protection to persons living in foreign countries, and who owe no real allegiance to this country.[14] The Government, in its

[14] The Cabinet Committee which recommended passage of the Act made the following observation in support of the 1940 expatriation provisions relating to naturalized citizens:

> "Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality o ttheir foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside. . . ." (Hearings Before the Committee on Immigration and Nationality, H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., p. 409 (1940)).

In its comments on the proposed Section 402(b) the Cabinet Committee added (*id.* at 494-495):

> "The problem presented by naturalized citizens of the United States residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals of whom they are thousands at the present day, has been a source of difficulty and embarrassment to the government of the United States. . . ."

The testimony of the State Department's Mr. Flournoy on this point is also illuminating (*id.* at 36-37):

> ". . . under the laws now existing we have thousands of persons living in foreign countries, usually in the foreign countries where they were born, or where their parents were born, having all their interests there, and their family connections, and yet they are citizens of the United States, and may call on our government for protection.
>
> "I refer not only to the naturalized citizens who have gone back to their native lands or gone to other countries—and there are many thousands of them—but to their children, born in those countries, who are alien in all their characteristics and connections and interests, yet have the right to enter the United States as citizens. . . ."

papers, had added nothing to these generalities. See Memorandum for Respondent, pp. 9-10.

The reason, we think, that neither the legislative history nor the Government in its papers can offer support for this discrimination is because there is nothing in the mere residence abroad of naturalized citizens which in any way is potentially more embarrassing to the United States in the conduct of its foreign affairs than the residence abroad of a native-born citizen. It is plain that the mere residence abroad of an American citizen, no matter whether he be native or naturalized, does not in and of itself result in friction with foreign governments. Whatever problems a citizen residing abroad, be he naturalized or native-born, may cause to his government arise not from the mere fact of his residence abroad, but either as a result of special circumstances, or due to some course of conduct engaged in by the citizen.

For the challenged legislation to meet the requirements of due process a showing would be required that Congress could not reasonably deal with these problems, which do not attend mere residence abroad but do so only in a few cases when such residence is accompanied by other circumstances which create the problems, without restricting the residence abroad of all naturalized citizens.

Nothing in the legislative history or in the Government's Memorandum indicates that such a broad discriminatory restriction of the rights of naturalized citizens was reasonably required to deal with these problems. A consideration of suggested justification for this legislation will establish that such a drastic measure is plainly inappropriate to deal with any actual problem.

(a) It has been suggested (Memorandum for Respondent, p. 10), that the residence abroad of a citizen could result in difficulty with a foreign government if the foreign government does not recognize the person as an American citizen, or claims that he is a citizen of either that country or a third country. This, however, is not a problem which is limited to naturalized citizens, nor is there the slightest indication that it can not be dealt with by specific legislation directed to this particular problem.

Such a problem may arise from the residence abroad of dual nationals, whose allegiance is claimed by both the United States and a foreign state. But Section 352 does not purport to deal with the problem of dual nationality and is applicable whether or not the individual is a dual national. Most naturalized Americans are not dual nationals and some native-born citizens are. Dual nationality is expressly dealt with by another section of the Immigration and Nationality Act of 1952, Section 350, 8 U.S.C. § 1482, which spells out when certain dual nationals lose their citizenship by residence in the foreign state of which they are nationals. Petitioner is, of course, not a dual national or a citizen of Germany.[15]

A similar problem may arise in the rare instance that the foreign state refuses to recognize the natural-

[15] Under the German Nationality Act of July 22, 1913, as amended, Section 25 (Germany) reprinted in Laws Concerning Nationality, p. 183 (United Nations, 1954), appellant, on acquiring American citizenship in 1950, and undoubtedly before that time, no longer possessed German nationality. Under recently enacted laws she can if she so desires become a German citizen on application because she is married to a German citizen but there is no compulsion on her to exercise this option and she has deliberately not done so because she desires to remain a citizen of the United States.

ization of an American citizen who resides within its borders. Most states, however, recognize the holder of an American passport as an American citizen and make no claim on his allegiance, even though he might be a former national of that country. Indeed, the Government has made no reference to any state which does not recognize American naturalization. In this case, for example, petitioner, so long as she was an American citizen, was treated by Germany as an American and Germany made no claim upon her. (R. 11) Even now that petitioner is a stateless person, Germany regards her stateless and does not make any claim upon her allegiance. (R. 8, 11)

There is no indication why limited and unusual problems of the foreign state which refuses to recognize United States citizenship could not be resolved by legislation vastly narrower in scope than the broad restrictions embodied in Section 352. For example, if Congress had provided that naturalized citizens who travel to a country which does not recognize their naturalization have no right to diplomatic protection, or perhaps even lose their citizenship. This would have completely solved this potential problem without affecting the right of naturalized citizens to reside in the overwhelming number of countries which do recognize American naturalization.

(b) The conduct of an American citizen, while abroad, as differentiated from his mere residence abroad, may of course embroil the United States into difficulties with foreign countries. But conduct of this type may be engaged in by either native-born or naturalized citizens. And, of course, this possibility is no excuse for depriving of citizenship a naturalized citizen who does not engage in such conduct. Congress, in Section 349 of the Immigration and Nationality Act

of 1952, 8 U.S.C. § 1481 has attached to certain acts of this kind loss of citizenship irrespective of how the person involved acquired his citizenship. Under this section, any American citizen who voluntarily joins a foreign army, swears allegiance to a foreign government, or votes in a foreign political election, loses his American citizenship.

No form of conduct has been pointed out which when performed by naturalized citizens is likely to embroil the United States in difficulties with foreign governments, but has no such effect when performed by native-born citizens. It is difficult to imagine such a situation. However, if such a form of conduct should be found to exist, Congress could perhaps attach to such conduct loss of citizenship, only when performed by a naturalized citizen. However, the mere remote possibility that some conduct by naturalized citizens residing abroad might raise problems does not justify expatriating all naturalized citizens who reside abroad for the stated periods whether or not they engaged in the disapproved type of activity. Problems of this character (if any there are) could have been properly and specifically dealt with if such problems had been presented in detail to Congress, so that Congress could have formulated provisions to deal with actual problems.

(c) In the complete absence of any showing that the discriminatory treatment of naturalized citizens is necessary or appropriate to deal with any actual problems, the legislative history indicates that an attempt was made to justify the legislation upon the assumption that naturalized citizens who reside abroad have to all intents and purposes given up their American citizenship and broken their ties to this country. See footnote 14.

This assumption is unsubstantiated, entirely without any basis, and plainly cannot justify the discrimination.

Naturalized citizens who, years after their naturalization, take residence in the state of their former nationality, or in some other state, for family, health or business reasons unforeseeable at the time of their naturalization, generally do so without in the slightest way surrendering their identity as Americans.[16] Such residence abroad does not mean or imply reversion of the naturalized citizen to his former allegiance. Indeed, a naturalized American citizen who made the deliberate choice to become an American citizen may be expected to be as proud of his American citizenship and as insistent on retaining his identity as an American as a native-born citizen who holds his citizenship by the accident of birth. Naturalized Americans abroad by reason of their understanding of the customs and language of their native countries may, in fact, be the best representatives of this country and interpreters of the virtues of its institutions. Nor need one elaborate the point that in the present state of international affairs such interpreters should be encouraged and not repudiated.

Nor, particularly in these days of fast and low cost international travel, does residence abroad carry with it a rupture of the ties with this country. A person may reside in a foreign country yet make regular visits in the United States to keep intact contacts with family,

[16] As noted under Point I(B) the problem of naturalized citizens who acquired American citizenship without the required intention to make the United States their home is covered by Section 340(d) of the Act, 8 U.S.C. § 1451(d) which creates a rebuttable presumption that any naturalized citizen who takes up residence abroad within 5 years from the date of naturalization acquired his citizenship by fraud.

friends and country. But regular visits to this country (even if frequent) do not protect a naturalized citizen from loss of citizenship as a result of residence abroad for the stated periods. In Section 101(a)(33) of the Act the term "residence" is defined as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of Section 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

Thus, a naturalized citizen will lose his citizenship under Section 352 even though he comes to his country regularly from his place of abode elsewhere.

That a naturalized citizen by residing abroad cannot be assumed to have abandoned for all intents and purposes his American citizenship and broken his ties with his country will be evident from the facts of this case. Petitioner resides in Germany only because she is married to a husband who practices his profession there. (R. 10; 11) Petitioner left Germany when she was at the age of four. That she took up residence there many years later for a purpose plainly not contemplated when she left as a child, or when she was naturalized as a school girl does not mean that she has in effect abandoned her allegiance and interests in the United States, no more than in the case of a native-born who marries a nonresident. (R. 9) To the contrary, as she stated in her affidavit filed in support of her motion for summary judgment, petitioner feels herself as an American and wishes to retain her American citizen-

ship. (R. 7-9) Nor does petitioner's residence in Germany mean that she has disrupted her ties with her relatives, practically all of whom live in the United States (R. 8), and with friends she made during her long years of schooling and residence here. (R. 9) Petitioner's ties with the United States remain in being the same as those of any other American woman who happened to be married to a husband who practices his business or profession abroad. As is typical for most Americans who, for marriage or other reasons must reside abroad, petitioner visited this country for six weeks in 1957 to show her first-born son to her relatives and friends.[17]

Furthermore, in the hearings leading to the enactment of this discriminatory provision embodied in Section 352 mention was made that this legislation was necessary so that naturalized citizens could not pass on American citizenship to their children who could remain American citizens without ever residing in the United States. As Mr. Flournoy, the Assistant Legal Advisor to the State Department, put it, Hearings Before the Committee on Immigration and Nationality, H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., p. 137 (1940):

> "And then, I think another very important element of this thing is the children. It is utterly absurd that these Italians should live in Italy or Hungarians who live in Hungary who are breeding citizens of the United States, who have a right, whenever they see fit, to come over to this country."

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[17] Although it is not in the record, petitioner came here again in 1960 after the Department of State had determined she had lost her citizenship. She came here on a visit with papers that stamped her as a stateless person.

This plainly can not represent a justification of the discrimination between naturalized and native-born citizens.

A child of native-born Americans who was born abroad or was taken abroad at an early age would have no more ties to the United States than a child of naturalized citizens raised abroad.

If American citizens who have never lived in this country present a problem, then this might justify a requirement that all such persons, whether the children are of native-born or of naturalized Americans must, to retain their American citizenship, reside for some period of time in the United States. But it can not provide any justification for depriving naturalized citizens who reside abroad of their citizenship because they may have children there, while leaving native-born citizens free to have as many children outside of this country as they please. Furthermore, children of naturalized citizens born abroad often are dual nationals and as such are in any event under another provision of the statute, Section 350, 8 U.S.C. § 1482 subject to certain residence requirements.[18]

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[18] Section 350 provides in pertinent part:

"A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall—

(1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States diplomatic or consular officer in a manner prescribed by the Secretary of State; and

(2) have his residence outside of the United States solely for one of the reasons set forth in paragraphs (1), (2), (4)-(7), or (8) of section 353 of this title, or paragraph (1) or (2) of section 354 of this title."

In summary, there is simply no rational connection between the problem of the citizen who lives abroad and the statute's discrimination between native-born and naturalized citizens. The discriminatory treatment of naturalized citizens in Section 352 can find no justification in the foreign affairs power. Particularly in view of the heavy burden needed to justify any law involving the drastic penalty of loss of citizenship, it is clear that Congress exceeded its powers in passing Section 352 as applicable only to naturalized citizens. Of course, Congress has the authority under the foreign affairs power to enact regulatory measures designed to avoid international frictions. Its measures, however, must be appropriately limited to those difficulties. From the above discussions, it is clear that no special foreign affairs problems arise from the mere residence abroad of naturalized citizens. Other factors accompanying such residence abroad may in a few cases result in difficulties, but such factors do not attend the residence abroad of petitioner or of the vast number of other naturalized citizens who reside abroad.

Thus, in the present case, unlike *Perez* v. *Brownell*, 356 U.S. 44, (1958) "The classification Congress has adopted" is entirely "inappropriate to the difficulties to be dealt with." 356 U.S. at 59. A statute can not expatriate citizens on the basis of foreign residence where it is not the foreign residence itself which causes difficulties but some particular conduct or some situation applicable to particular persons or groups of persons. *Bailey* v. *Alabama*, 219 U.S. 219, *Tot* v. *United States*, 319 U.S. 463 (1943), *Heiner* v. *Donnan*, 285 U.S. 312 (1932). It can hardly be said that the problems caused by residence abroad when accompanied by such added factors cannot be met more discreetly.

Residence coupled with certain forms of activities might be made the basis for expatriation. Or perhaps the same could be done where by the law the place of such residence has certain friction-creating consequences, such as refusal by the foreign state to recognize United States nationality. Or perhaps even any residence at all at certain times and places might be made a basis for expatriation. But no considerations of these possibility appears on the legislative history. It is incumbent upon the legislature to act with an adequate regard for the vital individual interests at stake and the alternative means for achieving the purpose of its legislation. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). It plainly has not done so here. Equally plainly, there has been no valid exercise of the foreign affairs power.

Accordingly, the discrimination in Section 352 is arbitrary, without justification, and must be struck down as violative of the Fifth Amendment.

II. CONGRESS HAD NO POWER TO ENACT SECTION 352 EVEN WITHOUT ITS DISCRIMINATORY PROVISION

We have pointed out that the arbitrary discrimination against naturalized citizens in Section 352 is a violation of the Fifth Amendment's requirement of due process of law. But even if the Section applied to all citizens equally, we submit it would have been beyond the powers of Congress, to enact. Congress, under its foreign affairs power, does not have the authority to attach to the mere residence abroad the withdrawal of citizenship.

Congress has no general power to deprive any person of citizenship. "The power of naturalization, vested in Congress by the Constitution is a power to confer

citizenship, not a power to take it away . . . ." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703 (1889).

There is, of course, no question that citizenship may be voluntarily relinquished. The right of voluntary expatriation was recognized by Congress in 1868. Act of July 27, 1868, 15 Stat. 223.

It has also long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation, but that Congress may provide that certain actions, in derogation of undivided allegiance to the United States, constitute a voluntary abandonment of American citizenship. *Savorgnan* v. *United States*, 338 U.S. 491. Thus, for example, Congress can provide that taking an oath of allegiance to a foreign government constitutes a voluntary act of expatriation. Similarly, there is no question that Congress may make any other act which demonstrates an allegiance to a foreign state inconsistent with the retention of American citizenship an expatriating act.

A. The Power to Expatriate Is Limited to Political Acts Inconsistent With American Citizenship, and Connoting Allegiance to Foreign Country

This Court has never held that Congress may attach loss of citizenship to a neutral act that is a non-political act completely consistent with American citizenship. On the contrary, this Court in *Perez* v. *Brownell*, 356 U.S. 44 made it clear that Congress had no power to do so.

In *Perez* v. *Brownell*, *supra*, this Court held that Congress pursuant to its foreign affairs power could take away the citizenship of a person who voluntarily voted in a foreign political election.

Perez was careful to emphasize, however, that the controlling elements in the decision sustaining the Act were (1) the fact that voting in a foreign political election connoted a lack of allegiance to the United States and allegiance to a foreign country, and (2) the fact that it involved the participation by a United States citizen in the political affairs of a foreign nation.

Mere residence abroad, as developed in greater detail below, involves neither of these elements.

The *Perez* opinion is explicit in stating that voting in a foreign political election is an act inconsistent with American citizenship. It states, 356 U.S. at 60-61,

> "... Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure; at least, inconsistent with American citizenship."

Statements of similar import appear in other parts of the opinion. Thus, for example, at 356 U.S. 54, the Court quotes from the report of the Cabinet Committee which recommended the legislation

> "'Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and

> at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.'

At 356 U.S. 57, this Court also stated:

> "The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance."

Plainly, however, mere residence abroad is a completely neutral act and cannot, as was the act involved in *Perez*, be reasonably regarded as an act inconsistent with allegiance to the United States.

Hundreds of thousands of Americans now have their residences in other countries, some for business reasons, some for reasons of health, or for a great variety of other personal reasons. They include both naturalized and native-born citizens. These persons are in many cases engaging in the same kinds of activities which they might pursue in this country.[18]

It is impossible to see how residence abroad, taken alone, can demonstrate a want of allegiance to this nation, particularly in an era of vastly expanding foreign commerce, investment and travel. Congress itself has demonstrated that it does not regard mere residence as a sign of lack of allegiance, for it has not

[18] State Department figures show that there are at present over 670,000 Americans, excluding military personnel, who reside in foreign countries throughout much of the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 857,000 United States passports issued during the year 1961 some 105,000 were issued to naturalized citizens.

seen fit to expatriate native-born citizens even if they spend their entire lives in foreign countries. In the case of native-born citizens, Congress has based expatriation primarily upon voluntary acts committed in foreign countries, with the emphasis on their voluntary nature. See testimony of Mr. Flournoy in Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong., 1st Sess. on HR 6127, superseded by HR 9980, p. 133 (1940); Note, "*Voluntary, A Concept in Expatriation Law*," 54 Col. L. Rev. 932 (1954).

The facts of this case demonstrate that residence abroad has no relation to allegiance to the United States. The appellant's residence in Germany is solely the result of the fact that Germany is her husband's home and the place where he practices his profession. Plainly residence with her husband has no connotation of political allegiance to his country.[19]

Perez also makes clear that it was the political nature of the activity which justified the statute as a proper exercise of the foreign affairs power. The opinion emphasizes that Congress, under its foreign affairs power, may apply the sanction of withdrawal of citizenship to deal with difficulties of an acute nature which may arise, "when the citizen of one country chooses to participate in the political or governmental affairs of another country." 356 U.S. at 59. The opinion indicates that if the statute were applied to

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[19] Older ideas on this score, applied to naturalized and native-born women alike, have been repealed, in the United States by the Nineteenth Amendment and the Cable Act of 1922 and, in Germany by legislation which gives the wife of a German the option but not the duty to obtain the nationality of her husband.

participation in an election non-political in nature, it could not be sustained. It states, *id.* at 59-60:

> "The subtle influences and repercussions with which the Government must deal make it reasonable for the generalized, although clearly limited, category of 'political election' to be used in defining the area of regulation. That description carries with it the scope and meaning of its context and purposes; classes of elections—nonpolitical in the colloquial sense—as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any national construction of the phrase."

Mere residence abroad requires no political activity. Residence abroad does not involve participation in the political or governmental affairs of another country. This careful distinction between foreign political activity subject to sanctions and prohibition and neutral non-political activity required by *Perez* has not been observed in Section 352.

Where conduct inconsistent with allegiance to the United States and importing allegiance to a foreign country threatens, as a result of its political nature, to embroil the United States into difficulties with foreign countries, *Perez* says Congress may rationally resolve this problem by attaching to such conduct termination of citizenship.

But where conduct—such as mere residence abroad—is completely consistent with continued allegiance to the United States, and non-political in nature, there is simply no rational basis for termination of citizenship.

Our position that Congress has no general power to deprive citizens of their citizenship for a neutral act

such as mere residence abroad does not require this Court to hold that Congress may never place restrictions on living abroad. Under some circumstances a restriction on living abroad, limited to a particular time and place and justified by the unusual circumstances existing with respect to a particular country might well present a wholly different constitutional question. It is possible that during the existence of a state of war in Europe, when the 1940 predecessor of Section 352 was passed, Congress might have said to all citizens that residence in particular European countries at war with our allies would be taken as casting doubt upon the individual's allegiance. It might have required all American citizens residing in those countries to return to the United States, perhaps even on pain of loss of citizenship. But Congress in Section 352 has not made any attempt to limit the consequence of loss of citizenship to residence abroad at a time and place which might rationally demonstrate lack of allegiance or participation in the affairs of a foreign country. Congress' sweeping exercise of power therefore cannot be justified by the fact that more limited exercise might conceivably be constitutional. There is no rational basis for the exercise of power which Congress has attempted here.

B. Withdrawal of Citizenship on Basis of Mere Residence Abroad Is an Unconstitutional Regulation of Travel

The lack of Congressional power to impose a general restraint on mere residence abroad is emphasized by the importance this Court, in *Kent* v. *Dulles*, 357 U.S. 116 (1958) attached to the right to travel. As we have seen under Point I(C)(4) above the right to travel includes the right to remain abroad for reasons of marriage, family, health, or any other lawful purpose.

The right to travel which *Kent* says, "may be as close to the heart of the individual as the choice of what he eats, wears or reads"

> "is a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment." 357 U.S. at 125-126

A general limitation of this vital right without reference to specific problems which might exist at a given time or place is, we submit, violative of due process, and therefore beyond the scope of Congressional power.

III. SECTION 352 IS REPUGNANT TO THE EIGHTH AMENDMENT

Even if Congress was authorized to limit residence abroad under its foreign affairs power, we submit the means employed—loss of citizenship—is prohibited by the Eighth Amendment. This Court has held that expatriation, if employed by Congress as a penalty, constitutes cruel and unusual punishment within the meaning of the Eighth Amendment. *Trop* v. *Dulles*, 356 U.S. 86 (1958). If Section 352 is penal in nature, it violates the Eighth Amendment.

The criteria for determining whether or not a statute is penal in nature were set forth as follows in the opinion of Chief Justice Warren in *Trop* v. *Dulles*, *supra*, at pp. 96-97:

> ". . . In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other

legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

Under this standard we think it clear that Section 352 was intended to be a penalty and a deterrent rather than a mere regulation of foreign affairs.

The manifest purpose and effect of Section 352 is to deter and prevent naturalized Americans from living abroad for longer than stated periods. Regardless of their allegiance to this country, and regardless of whether they are or are not embarrassing this country's foreign relations, they may not, on pain or loss of citizenship, live abroad beyond the three and five year limits.

Conclusive proof of the penal nature of Section 352 is found in the exceptions to its operation in Sections 353 and 354. These latter sections exempt from the penalties of Section 352 persons who have, for example, lived in this country twenty-five years after their naturalization; served in the armed forces; or incurred a disability in the service of the United States. These

exceptions completely negate the assertion that Section 352 is a regulation of foreign affairs. For these exceptions are nothing more than a mitigation of punishment for certain kinds of good behavior—behavior utterly unrelated to foreign affairs. In these exceptions Congress is rewarding naturalized Americans for certain services or actions with respect to this country. Rewards are the counterpart of punishments. They go together, and the system of rewards and punishment set up by Sections 353 and 354 is unmistakably directed to individual conduct and not to foreign affairs.

In *Perez* v. *Brownell*, 356 U.S. 44, this Court held that expatriation was not used in a penal sense where it was made the consequence of a voluntary and intentional act—voting in a foreign election. The statute in question applied to naturalized citizens and native-born citizens alike. It attached the consequence of loss of citizenship to a variety of acts such as taking an oath of allegiance to another country or voting in a foreign election. All of these acts involved in greater or lesser degree deliberate, intentional renunciation of American citizenship. All of them involved to some degree adherence to the government of another country, and as a consequence all of these acts were potentially embarrassing to the foreign affairs of this country.

Mere residence abroad does not, however, imply voluntary renunciation of citizenship or allegiance to another power. Thus it cannot reasonably be said that the person who resides abroad has *voluntarily* divested himself of his American citizenship. This point is crucial. The *Perez* case appears to be based on the concept of voluntariness. The statute was deemed non-

penal because it set a consequence upon a voluntary act. In the present case, however, the statute imposes a penalty which the individual concerned did not invite or seek by any voluntary act. Here the purpose and effect of the statute is to deter naturalized Americans from leaving this country to live abroad and to punish them if they do so.

CONCLUSION

Petitioner is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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APPENDIX

Additional Relevant Statutes

The following is the text of Sections 353, 354, 356 and 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1101:

SECTION 352 NOT EFFECTIVE AS TO CERTAIN PERSONS

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

* * * * *

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided*, That such residence does not exceed five years; or

(7) is a spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1)—(5) or (6) of this section, or paragraph (2) of section 354 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period or periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former national-

ity and birth or residence in an area outside the continental United States: *Provided*, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804(b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

SECTION 352 (A) (2) NOT APPLICABLE AS TO CERTAIN PERSONS

SEC. 354. Section 352(a)(2) of this title shall have no application to a national—

(1) who is a veteran of the Spanish-American War, World War I, or World War II, or of the Korean hostilities (having served honorably in an active-duty status in the military, air, or naval forces of the United States during a period beginning June 25, 1950, and ending July 1, 1955), and the spouse, children, and dependent parents of such veteran, whether such residence in the territory of a foreign state or states commenced before or after the effective date of this chapter: *Provided*, That any such veteran who upon June 27, 1952, has had his residence continuously in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated for three years or more, and who has retained his United States nationality solely by reason of the provisions of section 406(h) of the Nationality Act of 1940, shall not be subject to the provisions or requirements of section 352(a)(1) of this title: *Provided further*, That the provisions of section 404(c) of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to veterans of World War II;

(2) who has established to the satisfaction of the Secretary of State, as evidenced by possession of a valid unexpired United States passport or other valid document issued by the Secretary of State, that his

residence is temporarily outside of the United States for the purpose of (A) carrying on a commercial enterprise which in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce; or (B) carrying on scientific research on behalf of an institution accredited by the Secretary of State and engaged in research which in the opinion of the Secretary of State is directly and substantially beneficial to the interests of the United States; or (C) engaging in such work or activities, under such unique or unusual circumstances, as may be determined by the Secretary of State to be directly and substantially beneficial to the interests of the United States;

(3) who is the widow or widower of a citizen of the United States and who has attained the age of sixty years, and who has had a residence outside of the United States and its outlying possession for a period of not less than ten years during all of which period a marriage relationship has existed with a spouse who has had a residence outside of the United States and its outlying possessions in an occupation or capacity of the type designated in paragraphs (1), (2), (3), (4), or (5) (A) of section 353, or paragraphs (1), (2), or (4) of this section;

(4) who has attained the age of sixty years, and has had a residence outside of the United States and its outlying possessions for not less than ten years, during all of which period he has been engaged in an occupation of the type designated in paragraphs (1), (2), or (4) of section 353, or paragraph (2) of this section, and who is in bona fide retirement from such occupation; or

(5) who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence; or who prior to attaining the age

of twenty-one years, shall have had his residence in the United States for not less than fifteen years subsequent to his lawful admission for permanent residence.

NATIONALITY LOST SOLELY FROM PERFORMANCE OF ACTS OR FULFILLMENT OF CONDITIONS

SEC. 356. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.

LOSS OF NATIONALITY BY NATIVE-BORN OR NATURALIZED CITIZENS

SEC. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this Act, apply for a visa and for admission to the United

States as a nonquota immigrant under the provisions of section 101(a)(27)(E); or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4)(A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be desig-

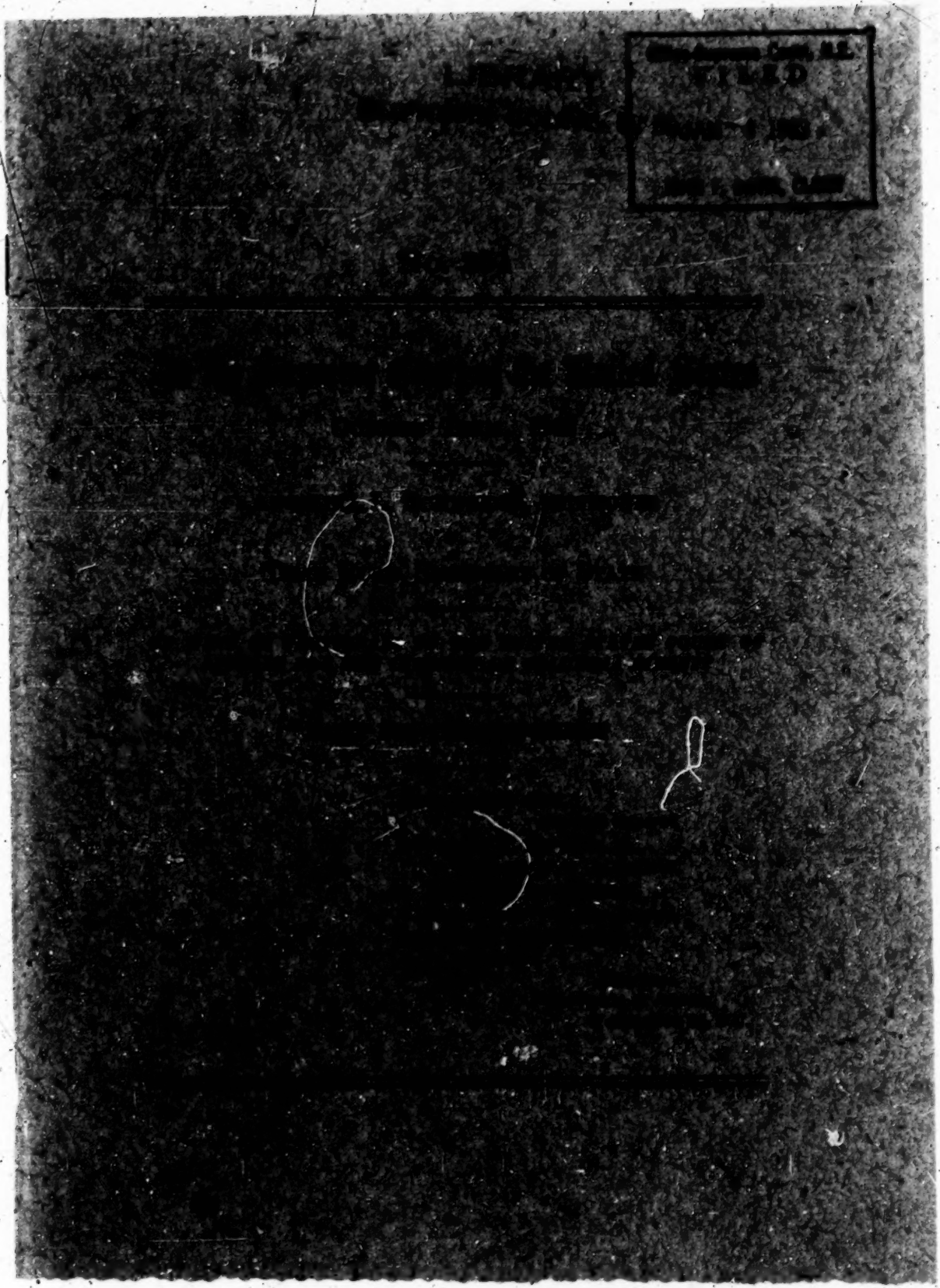
nated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

(b) Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act.



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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, PETITIONER

v.

DEAN RUSK, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 29–30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1962 (R. 29–30). The petition for a writ of certiorari was filed on July 15, 1962, and was granted on October 15, 1962 (R. 30). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 352(a)(1) of the Immigration and Nationality Act, providing for loss of United States nationality by a naturalized citizen who resides con-

tinuously for more than three years in the foreign state of which he was formerly a national, is a constitutional exercise of the powers of Congress.

STATUTE INVOLVED

Sections 101, 352, and 353 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 170, 269–270, 73 Stat. 274, 8 U.S.C. 1101, 1484–1485, provide in pertinent part as follows:

> SEC. 101. (a) (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.
>
> * * * * * *
>
> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> (2) having a continuous residence for five years in any foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.
>
> * * * * * *

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance: *Provided*, That in such case the person having his residence abroad shall, at

least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided,* That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is the spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1), (5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age twenty-one years had his residence in the United States for a period of [or] periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having

lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: Provided, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804 (b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

STATEMENT

Petitioner was born of German parents on May 28, 1934, in Bavaria and was a German national at birth. She was brought to the United States in 1939 or 1940. Her mother was naturalized as a United States citizen, and petitioner acquired derivative American citizenship in December 1950.[1] She studied abroad from 1954 to 1956 and, after a brief return to this country, went to Germany in June 1956 to marry a German citizen, the marriage taking place in July 1956. Petitioner has since resided continuously in Germany, with the exception of a family visit to the United States of about six weeks' duration in 1957. She intends to continue to live in Germany and has "no definite intention to return to the United States to reside" (R. 21; see also R. 10). Her two sons, who were born in Germany in 1957 and 1958, acquired German citizenship by virtue of their father's na-

[1] While the record does not contain the information, the files of the Immigration and Nationality Service show that petitioner's mother was naturalized in 1947, that her father was never naturalized and that her mother died in 1947 and her father in 1950.

tionality and American citizenship by virtue of Section 301(a)(7) of the Immigration and Nationality Act of 1952[2] (R. 21). Petitioner has not reacquired German nationality although she could do so on an expedited basis if she wished because she is married to a German citizen.[3]

In 1959, the United States denied further extension of the passport petitioner had held since 1954. The State Department certified that petitioner had expatriated herself under Section 352(a)(1) of the Immigration and Nationality Act of 1952[4] by continuous residence for three years in the foreign state of which she was a national prior to naturalization as a United States citizen (R. 15–16, 21–22). This decision was affirmed by the Department's Board of Review on the Loss of Nationality in January 1960 (R. 23).[5]

In February 1960, petitioner filed suit in the United States District Court for the District of Columbia for an order (1) enjoining the Secretary of State from enforcing Section 352(a)(1), and (2) declaring petitioner a citizen of the United States (R. 1–5). Petitioner having moved for summary judgment and the Secretary having moved for judgment on the pleadings, the district court entered judgment grant-

[2] 66 Stat. 235, 8 U.S.C. 1401(a)(7).

[3] See Pet. Br. 38, n. 15. The applicable (West) German law is Art. II(1), Third Law Governing Questions of Citizenship, Aug. 19, 1957.

[4] 66 Stat. 269, 8 U.S.C. 1484(a)(1) (see p. 2, *supra*).

[5] Petitioner returned to the United States for a visit in 1960 after the State Department had determined that she had expatriated herself, traveling on papers indicating that she was a stateless person (Pet. Br. 43, n. 17).

ing the Secretary's motion (R. 28). The court of appeals affirmed, *per curiam*, citing *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860 (R. 29–30).

SUMMARY OF ARGUMENT

I

Prior decisions of this Court have established that Congress, in pursuance of its powers to enact legislation, may attach the loss of American nationality to a voluntary act on the part of the citizen, where such action bears a reasonable relationship to the legitimate exercise of the power. In providing that three years' residence by a naturalized citizen in the country of his origin should result in expatriation, Congress was primarily invoking its power over foreign affairs. It was responding to a long history of diplomatic experience in which citizens returning to their land of origin would be the subject of various demands by that country (such as for military service) and would then seek this country's protection. The giving of protection in these circumstances invariably created friction between the two countries, and failing to give it was considered embarrassing to this country in the conduct of its foreign affairs.

Various means were sought for dealing with this problem. During some phases of our history, diplomatic protection was simply denied naturalized citizens returning to the country of their origin. Later this country sought to conclude naturalization treaties with other countries, under which each would recognize the other country's naturalization as conclusive;

however, a number of important countries refused to enter into such treaties. Later, the rights of citizenship were administratively granted or denied to naturalized persons residing in the country of their origin, depending upon the circumstances of each case. In 1907, Congress enacted a provision whereby a naturalized citizen residing for two years in the country of his origin would be presumed to have lost his citizenship, but this statute was found to be unsatisfactory in operation.

After detailed study, a cabinet committee in 1938 recommended the enactment of the present provision. The State Department had found that the problem of naturalized citizens residing in the country of their origin had become quite burdensome and embarrassing to this country's foreign relations. It rejected methods of dealing with the problem other than expatriation, such as denial of protection, on the ground that they had proved unworkable. After careful consideration and extensive hearings, Congress enacted the recommended provision in the Nationality Act of 1940. It was retained as Section 352(a)(1) of the Immigration and Nationality Act of 1952.

There was a reasonable connection between the regulation of foreign relations and the attachment of expatriation to protracted residence by a naturalized citizen in the country of his origin. Without question, the termination of the individual's citizenship would terminate the possibility that his foreign residence could cause the types of problems with which the State Department and Congress were concerned. Moreover, termination of these persons' citizenship

would also assist in the control of another problem with which Congress was concerned in 1940—dual nationality. Other methods for attacking the basic problem having been tried and found wanting, it was reasonable for Congress to conclude that expatriation was the only practical alternative available.

The classification to which Congress made this provision applicable—all naturalized citizens—was not larger than reasonably necessary. Nothing in this country's diplomatic history had suggested any smaller class. Moreover, Congress did make a conscientious effort to limit the reach of the provision by providing numerous exceptions excluding from its coverage those groups (in terms of age, employment, physical disability, etc.) who experience had shown were least likely to be the cause of international problems. Finally, Congress was not required to limit the application of the statute to those whose residence abroad actually caused international problems; *ad hoc* treatment is not necessary in relation to such a general problem as the conduct of international affairs.

This provision can also be sustained as an exercise of the power of Congress to regulate United States citizenship. It is apparent from its legislative history that both Congress and those on whom it relied regarded a naturalized citizen's returning to reside permanently in the country of his origin as importing not only a lack of allegiance to this country but the reestablishment of a relationship with another country that is inconsistent with American citizenship. This was by no means an unreasonable view.

II

It was not an unreasonable discrimination for Congress to make Section 352(a)(1) applicable only to naturalized citizens. In many cases this Court has sustained differentiations of treatment among different classes of persons upon a showing that the classification was reasonably devised to meet a demonstrated need. Indeed, the Court has recognized the validity of distinctions between different classes of citizens on the basis of foreign residence, and there are a number of such distinctions written into the law of this country. Drawing lines between naturalized and natural-born citizens in relation to foreign residence not only has a basis in well over 100 years of this country's diplomatic practice, but is well established in the practice of other Nations.

The diplomatic experience of this country makes it clear that the classification adopted by Congress was not unreasonable or arbitrary. That history demonstrates that it is the fact that a person is a naturalized citizen (and hence, by hypothesis, was born in another country and had possessed or still possessed another nationality) that makes him a potential source of foreign relations problems for this country. That being so, Congress was not bound to make the statute applicable to others having a lesser potentiality for creating such problems. It is noteworthy, in this connection, that Congress has attached various disabilities in other instances of foreign residence by American citizens in proportion to their problem-creating potential.

There is nothing "invidious" about the distinction that Congress has drawn here. It simply recognizes the facts of diplomatic experience—that naturalized citizens who return to reside permanently in the country of their origin are very likely to cause this country serious international problems. The reasonableness of the classification adopted by Congress is further demonstrated by the fact that expatriation of such individuals works far less of a hardship upon them than would a provision expatriating natural-born citizens who reside abroad. The connections that naturalized citizens have with their country of origin make it much easier for them to become reassimilated into the life of that country.

III

There is no basis whatever for a contention that Section 352(a)(1) is a "penal" provision which brings into play the Eighth Amendment's prohibition against cruel and unusual punishment. It is clear from the legislative history of the statute that its enactment was motivated primarily by a purpose to regulate the foreign affairs of this country. There is nothing in that history or on the face of the statute to suggest that there was any penal intent whatever in connection with its passage.

ARGUMENT

Petitioner, a native and former national of Germany who subsequently became a naturalized citizen of this country, has expatriated herself under the terms of Section 352(a)(1) of the Immigration and

Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. 1484 (a)(1), which provides:

> (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, * * *.

The case is here on petitioner's challenge to the constitutional validity of this Act of Congress.

Section 351(a)(1) is, in our view, clearly constitutional. It was enacted, as an exercise of Congress's undoubted power to regulate the foreign affairs of this country, in response to a long history of international problems generated by the residence of naturalized citizens in the country of their origin; the congressional judgment that expatriation was the only effective way of dealing with these problems was a rational one. Moreover, since reassumption by a naturalized citizen of residence in the country of his former nationality may reasonably be viewed as importing some transfer of allegiance to that country, this statute is also sustainable as an exercise of Congress's power over United States citizenship. The statute's differentiation between naturalized and natural-born citizens does not unjustifiably discriminate against the former in violation of the Fifth Amendment, for the distinction is a rational one, firmly rooted in diplomatic history, the traditional practice

* Section 353 of the Act, 66 Stat. 270, as amended by 73 Stat. 274, 8 U.S.C. 1485, provides a number of exceptions to the application of Section 352(a)(1) (see pp. 3–5, *supra*); however, petitioner qualifies under none.

of this and many other countries and, indeed, the decisions of this Court. Finally, there is no basis whatever for considering the statute as imposing punishment and therefore as violating the Eighth Amendment.

I. CONGRESS HAS POWER TO MAKE PROLONGED RESIDENCE BY A NATURALIZED CITIZEN IN THE COUNTRY OF HIS ORIGIN AN EXPATRIATING ACT

The power of Congress to enact expatriation statutes has been firmly established by the decisions of this Court. In *Mackenzie* v. *Hare*, 239 U.S. 299, the Court sustained a statute suspending during coverture the citizenship of an American woman who married a foreigner. In *Savorgnan* v. *United States*, 338 U.S. 491, the Court upheld a statute providing that the taking of an oath of allegiance to a foreign sovereign would result in the loss of citizenship. And in *Perez* v. *Brownell*, 356 U.S. 44, the Court held that it was within the constitutional power of Congress to make voting in a foreign election an act of expatriation. The power of Congress to enact the statute involved in this case—Section 352(a)(1) of the Immigration and Nationality Act of 1952, providing for the expatriation of naturalized citizens who reside in the country of their origin for three or more years—has not previously been before this Court or any other appellate court. However, the Court of Appeals for the District of Columbia Circuit sustained the validity of a companion provision (Section 352(a)(2), which provides for the expatriation of naturalized citizens who reside in *any* foreign country for more than *five*

years) in *Lapides* v. *Clark*, 176 F. 2d 619, certiorari denied, 338 U.S. 860. There the court unanimously upheld the power of Congress to expatriate on grounds of foreign residence.[1]

The teaching of these cases is that Congress, in pursuance of a granted or implied power to enact legislation, may attach the loss of American nationality to a voluntary act on the part of the citizen, where such action bears a reasonable relationship to the legitimate exercise of the power. To say that the citizen's act must be "voluntary" is not to say that, by having engaged in it, the citizen must have intended or desired to expatriate himself. See *Perez* v. *Brownell*, *supra*, 356 U.S. at 61. Quite the contrary: the petitioner in the *Mackenzie* case "had not intended to give up her American citizenship" when she committed the expatriating act (*Savorgnan* v. *United States*, *supra*, 338 U.S. at 501); the petitioner in the *Savorgnan* case "had no intention of endangering her American citizenship or of renouncing her allegiance to the United States" (338 U.S. at 495). Thus it is wholly irrelevant that petitioner's loss of citizenship may be "contrary to her intentions, her feelings and her political allegiance" (Pet. Br. 14)). There is no question but that she engaged in conduct—protracted residence in the country of her birth and former nationality—to which Congress has attached the conse-

[1] Judge Edgerton, while dissenting on the ground that the statute was unconstitutionally discriminatory (a ground which we discuss at pp. 44–54, *infra*), agreed with the majority of the court that "Congress may expatriate citizens on reasonable grounds. No doubt these may include five years residence abroad" (176 F. 2d at 623).

quence of expatriation, and there is no question but that she engaged in that conduct of her own free will and without any sort of compulsion.

Accordingly, the only questions remaining on the issue of whether Congress had the power to attach loss of citizenship to protracted residence by naturalized citizens in the country of their origin are (1) whether Congress was acting under one of its granted or implied powers, and (2) whether there is a reasonable relationship between expatriation and one of the permissible objectives of the exercise of that power. We submit that Congress was acting under its comprehensive powers to regulate the foreign affairs of the United States and to regulate citizenship in the United States. Furthermore, we believe that there is a rational nexus between the permissible objectives of the exercise of those powers and the imposition of loss of citizenship.

A. SECTION 352(a)(1) IS A VALID EXERCISE OF CONGRESS'S POWER TO REGULATE THE FOREIGN RELATIONS OF THE UNITED STATES

In each of the cases in which this Court has sustained an expatriation statute, it has concluded that Congress was acting under its settled power to regulate the relations of this country with other nations.[8] *Mackenzie* v. *Hare*, 239 U.S. 299, 311–312; *Savorgnan* v. *United States*, 338 U.S. 491, 500 and n. 17; *Perez* v. *Brownell*, 356 U.S. 44, 57–60. In *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860, a companion statute to the one involved in this

[8] The nature of that power is discussed at length in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 314–322.

case* was sustained as a valid exercise of the foreign affairs power of Congress (176 F. 2d at 621). Similarly, Section 352(a)(1) of the 1952 Act, under which petitioner was held to have expatriated herself for residing in the country of her origin for over three years, was within the constitutional power of Congress to regulate the foreign relations of the United States.

An examination of the diplomatic background of this provision, which we set forth in the following pages, makes clear the international relations problem that gave rise to it. And its legislative history, which we also set forth, makes it equally clear that, in attempting to meet this problem, Congress was primarily invoking its power over foreign affairs. Finally, both the diplomatic background and the legislative history of Section 352(a)(1) plainly establish the rationality of Congress's conclusion that, in order to solve the foreign relations problem confronting it, resort to the process of expatriation was reasonably necessary.

1. *The diplomatic background and legislative history of Section 352(a)(1)*

The return of naturalized citizens to reside at length in the country of their origin has long been a serious source of embarrassment and conflict in the foreign relations of the United States. The diplomatic history of this country is replete with instances in which the original country conscripted the returned native into its military service, charged him with a political

* See pp. 13–14, *supra*.

offense or made other demands upon him on the basis of his former connection; the native, in turn, sought the assistance of the United States, usually in the form of diplomatic protection, but sometimes in the form of other services. The inevitable result was either friction between the two countries or the embarrassment of inaction. See, *e.g.*, 3 Moore, *Digest of International Law* (1906), pp. 562–745, 735–757, 766–771.

During the middle part of the Nineteenth Century, the response of the United States to these demands varied from time to time, depending, no doubt, upon the current state of international relations, the magnitude of the problem at any given time and the policies of the administration in power. At times the naturalized citizen who returned to the country of his origin would simply be denied protection or any assurance of protection. *E.g.*, Wheaton to Knoche, July 24, 1840, S. Exec. Doc. No. 38, 36th Cong., 1st Sess., p. 6; Fish to Mintz, Feb. 1, 1870, 3 Moore, *supra*, at p. 582. Such refusals assumed that this country had no right to interfere with another country's enforcement of its claims against persons who, according to its laws, still owed it allegiance. *E.g.*, Marcy to Daniel, Nov. 10, 1855, 3 *id.* at pp. 569–570.

On the other hand, the refusal to grant protection and other such services to American citizens was considered embarrassing to the dignity of a Nation committed to the defense of the rights of its citizens. *E.g.*, Seward to Wright, Dec. 2, 1865, 3 Dipl. Corr. 1865, pp. 68–69. When the United States did intervene on behalf of a naturalized citizen who had returned to the country of his origin, it was often flatly

rebuffed. *E.g.*, Marcy to Bicknell, July 6, 1853, 3 Moore, *supra*, at p. 569. In other instances it was successful in securing relief for the naturalized citizen, but it was acutely conscious of the fact that such successes were at the expense of its good relations with the country in question, *e.g.*, S. Exec. Doc. No. 38, *supra*, at pp. 145–146, and it often attempted to discourage naturalized citizens from putting the United States in conflict with their former homeland. *E.g.*, Buchanan to Huesman, March 10, 1847, 3 Moore, *supra*, at p. 566.

Shortly after the Civil War, this country attempted a new approach to the problem. In 1868, Bancroft, the American Minister to the North German Confederation, negotiated a naturalization treaty with that State, which provided that each country would recognize the naturalization of its own natives by the other country; it provided, however, that "[i]f a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. * * * The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." 15 Stat. 615, 616–617. Similar treaties, known as the "Bancroft treaties," were concluded with a number of other countries from then on and well into the Twentieth Century.[10] However, many

[10] *E.g.*, 17 Stat. 941 (Denmark), 37 Stat. 1655 (convention with a number of Latin American countries). The United States now has naturalization treaties or conventions with the following 20 countries: Albania, Argentina, Belgium, Bulgaria, Chile, Colombia, Costa Rica, Czechoslovakia, Denmark, Ecua-

countries, including a number of large and important ones, refused to enter into such treaties. *E.g.*, 3 Moore, *supra*, at pp. 604–607 (Greece), 609 (Italy), 622 (Russia).

The basic problem persisted in relation to the many countries with which the United States did not have naturalization treaties; moreover, the treaties themselves required administrative construction. Accordingly, in the latter part of the Nineteenth Century, the State Department developed standards for determining when naturalized citizens who returned to the country of their origin would be considered as having "expatriated" themselves (a term that tended to imply loss of the right to such incidents of citizenship as was within the Department's power to grant or deny, such as passports and protection; see 3 Moore, *supra*, at p. 711).[11] Among the considerations that were sometimes taken into account in addition to resumption of native residence were lack of manifestation of intention to return (*e.g.*, Rives to Proios, Oct. 25, 1888, 2 For. Rel. 1888, p. 1620), failure to

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dor, El Salvador, Haiti, Honduras, Nicaragua, Norway, Panama, Peru, Portugal, Sweden, and Uruguay. With respect to most of them, it is provided that return of the naturalized citizen to the country of his origin not only will result in the loss of his naturalized citizenship but will also effect his reacquisition of his original citizenship.

[11] During this period, some natural-born citizens were also considered to have "expatriated" themselves, but they had to commit considerably more serious acts than did naturalized citizens in order for this consequence to follow. *E.g.*, 14 Ops. Att'y Gen. 295, 298–299; Fish to Grant, Aug. 25, 1873, 2 For. Rel. 1873, p. 1191; see also Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), p. 107; *Perez* v. *Brownell*, 356 U.S. 44, 49.

pay any taxes to the United States (*e.g.*, Fish to MacVeagh, For. Rel. 1871, p. 887), lack of ownership of property in the United States (Frelinghuysen to Lowell, Feb. 27, 1884, For. Rel. 1884, p. 216), and "settl[ing] himself in business" in his native land (Porter to Meyer, June 30, 1887, 3 Moore, *supra*, at p. 769). The fact that the individual had not engaged in any political activities in his former country was not necessarily thought to weigh against expatriation (*e.g.*, Porter to Curry, Jan. 4, 1886, *id.* at pp. 768–769). On the basis of such determinations as these, naturalized citizens were denied protection (*e.g.*, Davis to Barnett, Aug. 20, 1884, *id.* at p. 739), refused passports (*e.g.*, Rives to Proios, *supra*), and denied the right to have the United States press financial claims on their behalf (*e.g.*, Frelinghuysen to Lowell, *supra*).

While "[n]o one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection," *Perez* v. *Brownell*, 356 U.S. 44, 49, it was widely regarded as unsatisfactory that these determinations should depend on a scattering of treaties and ungoverned executive discretion (see H. Doc. No. 326, 59th Cong., 2d Sess., pp. 13, 26). As early as 1863, President Lincoln, troubled by the "altercations and great prejudices" that had resulted from the return of naturalized citizens to their country of origin during the Civil War, suggested to Congress that "[i]t might be advisable to fix a limit beyond which no citizen of the United States residing abroad may claim the

interposition of his Government." 6 *Messages & Papers of the Presidents* (Richardson ed. 1897), p. 181. President Grant urged Congress to adopt legislation defining "what acts or formalities shall work expatriation or when a citizen shall be deemed to have renounced or to have lost his citizenship" (7 *id.* at p. 291); he emphasized the need for resolving problems of foreign residence, especially of naturalized citizens (7 *id.* at pp. 291–292, 405–406).

One small step in the direction of solving this problem was taken by Congress in passing the Naturalization Act of 1906, 34 Stat. 596, 601, which provided that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed presumptively fraudulent and subject to revocation.[12] During the consideration of this legislation, Congress called for a thorough examination into the problems relating to American citizenship, expatriation and protection (see *Perez* v. *Brownell, supra,* 356 U.S. at 49–50). Accordingly, the Secretary of State, Elihu Root, appointed several high officials of the State Department to a Citizenship Board whose assignment was to consider and report on these matters (see H. Doc. No. 326 *supra,* at pp. 1–2).

The Board submitted an extensive report late in 1906 (H. Doc. No. 326, *supra*). It noted that "the class of Americans who separate themselves from the United States and live within the jurisdiction of for-

[12] This provision is now contained in Section 340(d) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. 1451(d). Its constitutionality was sustained in *Luria* v. *United States*, 231 U.S. 9.

eign countries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers"; it went on to observe that the problem was becoming particularly acute with respect to naturalized citizens, for "[n]aturalized citizens are more apt to go abroad than native citizens. Having already changed their domicile, they are more apt to change it again" (H. Doc. No. 326, *supra,* at p. 25). The Board noted that persons residing abroad with no intention to return had been denied diplomatic protection. However, it concluded that this was not a satisfactory mode of dealing with the problem: the transitory character of a denial of protection permits the unseemly spectacle in which "one official may grant what another has refused"; moreover, mere denial of protection leaves too much uncertainty with respect to the status of a citizen (*id.* at 26).

The Board recommended (*inter alia*) the enactment of a provision whereby citizens "may be assumed" to have expatriated themselves (1) by obtaining naturalization in a foreign state, (2) by engaging in the service of a foreign government where the taking of an oath of allegiance is involved, and (3) by becoming domiciled in a foreign state, such domicile to be rebuttably presumed from residence in a foreign state for five years without intent to return to the United States (*id.* at p. 23).[12] On the basis of these recommendations, Congress provided, in Section 2 of the Nationality Act of 1907, 34 Stat.

[12] The Board also recommended the renewal of efforts to obtain naturalization treaties (H. Doc. No. 326, *supra*, at pp. 13–14).

1228, that persons naturalized in a foreign state or taking an oath of allegiance in a foreign state should "be deemed to have expatriated" themselves, and that

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen * * *.

The presumption was made rebuttable. In explaining the purpose of this provision, the House committee stated (H. Rep. No. 6431, 59th Cong., 2d Sess., p. 2):

> Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. * * * Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. * * *
>
> * * * [S]uch a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.

For the administration of the State Department's responsibilities under this Act, Secretary Root promptly issued detailed instructions. They provided that the presumption of the loss of naturalized citizenship by reason of protracted residence in a foreign state might be overcome by the presentation of satisfactory evidence that the individual intended eventually to return to the United States to reside

permanently and that his residence abroad (1) is solely as a representative of America trade or commerce, (2) is in good faith for reasons of health or education, or (3) results from unforeseen and controlling exigencies preventing his return (Instructions of April 19, 1907, 1 For. Rel. 1907, p. 4). These standards were later expanded to cover other circumstances (see Nationality Laws of the United States, 1938, part 1, House Committee Print, 76th Cong., 1st Sess., pp. 69–70), and formed the basis for the many exceptions to the provision involved in this case (see pp. 36–37, *infra*).

However, the presumption written into the 1907 Act proved troublesome. An Attorney General described it in 1928 as "so loosely drawn that its operation and effect have been in doubt ever since its passage" and urged the need for "clarifying legislation" (35 Ops. Att'y Gen. 399, 404). A committee consisting of the Secretary of State, the Attorney General and the Secretary of Labor, appointed by President Roosevelt in 1933 to review the nationality laws of the country, concluded that, while the foreign residence presumption for naturalized citizens

> has been of much practical use * * *, it has been found to a considerable extent to be insufficient and unsatisfactory, since, as construed by the courts, the presumption of loss of citizenship arising under its terms never becomes final, regardless of the length and cause of the foreign residence.

(Nationality Laws of the United States, part 1, *supra*, at p. 70). Moreover, the committee observed, the

courts had construed the presumption as relating "to loss of the right to diplomatic protection as a citizen, rather than loss of citizenship itself" (*ibid.*), so that the purposes of the 1907 legislation had largely been frustrated.

The cabinet committee (whose report and draft nationality code were the culmination of a five-year study by specialists) went on to emphasize the character and scope of the problem (*ibid.*):

> The problem presented by naturalized citizens of the United States residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals, of whom there are thousands at the present day, has been a cause of difficulty and embarrassment to the Government of the United States in its efforts to extend protection to other naturalized citizens in meritorious cases. * * *

To the same effect: "The number of these cases is very large, and they are a constant source of irritation" (*id.* at p. 71). Accordingly, the committee recommended the enactment of a provision that a naturalized citizen (unless he came within specified exceptions) should lose his citizenship by "[r]esiding continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated" (*id.* at pp. 69, 76)."

"The committee also recommended provision for the expatriation of a naturalized citizen who resides for two years in his country of origin if he thereby acquires its nationality by

In its letter transmitting its report to the President, the cabinet committee stated (*id.* at p. vii):

> Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality to their foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside. * * *

It went on to note that "[t]he mere presumption" provided for in the 1907 Act "has proven inadequate" (*ibid.*). In explaining why expatriation rather than denial of protection was recommended, the committee said, "In general the right to protection should be coexistent with citizenship, and a law under which persons residing abroad are denied the protection of this Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable" (*ibid.*). The committee also stated (*ibid.*):

> None of the provisions in the [draft] Code concerning loss of American nationality, such as those applicable to * * * persons, who, after obtaining American nationality through natu-

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operation of law (Nationality Laws of the United States, *supra*, at p. 69).

The committee expressed the hope that enactment of the three-year provision might induce more countries to enter into naturalization treaties with the United States (*id.* at p. 71). See pp. 18–19, *supra*.

> ralization, establish a residence abroad, is designed to be punitive or interfere with freedom of action. * * *

The President transmitted the report and draft code to Congress in June 1938.

Extensive hearings were held on the draft code (which eventually became the Nationality Act of 1940) by the House Committee on Immigration and Naturalization. Mr. Flournoy, Assistant Legal Adviser of the State Department, testified that the provision for the expatriation of naturalized citizens residing for three years in their country of origin "is the most important proposed change in the whole code" (Hearings before House Immigration and Naturalization Committee on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 134); he went on to say that "[w]e in the State Department, and so far as I know those in the other Departments, think that it is a reasonable and most desirable provision" (*ibid*). He described the problem it was designed to meet as follows (*ibid.*):

> We have every day in the State Department cases of persons applying to us for passports or protection, or asking us to support claims, who have been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years. We think there should be some point at which such person should lose not only his right to protection but his citizenship itself. * * * [15]

[15] Elsewhere he stated: "[A] still more serious reason why the Department of State is interested in this measure is that under the laws now existing we have thousands of persons living in

He also pointed out, "I refer not only to the naturalized citizens who have gone back to their native lands or gone to other countries—and there are many thousands of them—but to their children, born in those countries, who are alien in all of their characteristics and connections and interests, yet have the right to enter the United States as citizens" (*id.* at p. 37).[16] He explained why mere denial of protection was an insufficient remedy (*id.* at pp. 134–135):

> We consider it very undesirable that we should have persons who are not entitled to the protection of our Government and yet remain as citizens of the United States. It makes it difficult for us to extend the effect of protection to those who are really citizens and have maintained connections with the United States, to have these people retaining their citizenship.

In the debates on this provision, Chairman Dickstein of the House Committee said, in summary, that the bill would "relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose" (86 Cong. Rec. 11944). Rep. Rees, sponsor of the bill, discussed the "very important provisions under which persons who have been naturalized in this country will lose their American nationality as a result of portracted residence in foreign countries"; he said that these provisions were "distinctly preferable" to

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foreign countries, usually in the foreign countries where they were born, or where their parents were born, having all their interests there, and their family connections, and yet they are citizens of the United States, and they may call on our Government for protection" (Hearings, *supra*, at pp. 36–37).

[16] See also Hearings, *supra*, at p. 137.

those of the 1907 Act, which in his view had been ineffective (86 Cong. Rec. 11948). Rep. Rees also pointed out that a naturalized citizen residing at length abroad "may marry a citizen of the foreign country in which he resides and transmit citizenship to children born therein" (86 Cong. Rec. 11949). This statement should be considered in the light of one purpose of the 1940 Act that was paramount in the minds of its sponsors: that of reducing the incidence of dual nationality to a minimum (see, *e.g.*, 86 Cong. Rec. 11944, 11948).

In the Nationality Act of 1940 as passed by Congress, the provision for expatriating naturalized citizens who reside in their country of origin for three years was incorporated, as Section 404(b), exactly as it had been proposed by the cabinet committee. 54 Stat. 1170. In addition, Congress added a provision (Section 404(c)) that a naturalized citizen "[r]esiding continuously for five years in any other foreign state" should lose his citizenship. 54 Stat. 1170.[17]

A congressional investigation of the immigration and nationality laws instituted some seven years later concluded that the "continuous residence" requirement in Sections 404(b) and (c) left the door too wide open for evasion, since persons subject to those provisions "break the continuity of their foreign residence by short trips to another foreign country, or by a short visit to the United States." S. Rep. No.

[17] It also adopted the provision for the expatriation of naturalized citizens who reside for two years in their country of origin if they thereby become citizens thereof. Section 404(a), 54 Stat. 1170. See note 14, *supra*.

1515, 81st Cong., 2d Sess., p. 767.[18] The investigating subcommittee also recommended that several additional groups of individuals be added to those excepted from the operation of Section 404. *Id.* at pp. 767–768.[18] These recommendations were adopted in the Immigration and Nationality Act of 1952, which carried over the three-year provision unchanged as Section 352(a)(1) and the five-year provision as Section 352(a)(2), 66 Stat. 269, 8 U.S.C. 1484(a)(1), (a)(2); a specific definition of "continuous residence" was adopted as part of Section 101(a)(33), 66 Stat. 166, 8 U.S.C. 1101(a)(33); and the groups excepted from the operation of Section 352 were enlarged (see pp. 3–5, *supra*). These provisions have not been amended significantly (see 73 Stat. 274, 8 U.S.C. 1485 (7)).

2. *The rationality of Congress's choice of expatriation as a remedy*

It is abundantly clear from the foregoing recitation of the diplomatic and legislative background of Section 352(a)(1) that the problem with which it deals has been a persistent one in the foreign relations of the United States and that Congress, in enacting it, "was seeking to effectuate its power to regulate foreign affairs." *Perez* v. *Brownell*, 356 U.S. 44, 57. Indeed, it is fair to say that no other expatriation provision—including the one sustained in *Perez* v. *Brownell, supra*—is supported by such extensive evi-

[18] The committee also recommended the repeal of the two-year provision referred to in notes 14 and 17, *supra*. S. Rep. No. 1515, *supra*, at p. 767. This recommendation was followed by Congress.

dence of serious diplomatic problems and sincere governmental efforts to resolve them. Since the power of Congress to employ the remedy of expatriation where reasonably necessary to solve foreign affairs problems is well settled, the question remains whether "the means—in this case, the withdrawal of citizenship—[is] reasonably related to the end—here, regulation of foreign affairs." *Perez* v. *Brownell, supra,* 356 U.S. at 58.

The "rational nexus" between the governmental problems stemming from foreign residence of naturalized citizens and the legislative withdrawal of citizenship is readily apparent from the diplomatic background of Section 352(a)(1). Experience showed that when such persons took up prolonged residence in their native lands, their former attachment was often used by the other government as a lever to extract the performance of various obligations or services. And, of course, the longer they remained, the greater were the chances of their being so implicated. Thereupon, this country would generally be called upon to intercede in one way or another; the almost invariable consequence was international friction and conflict if intercession was attempted, embarrassment if this country backed away. It may be easily supposed, too (although the diplomatic correspondence naturally does not reveal it), that the country of such a person's origin might, on the basis of his former attachment and his extended presence there, exert pressure upon him to use his American

citizenship secretly for purposes inimical to the interests of this country.[19]

In all of these situations, as in the *Perez* case, *supra*, "it is the possession of American citizenship by a person committing the act [here, protracted residence in the country of his origin] that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations" (356 U.S. at 60).[20] If the person who has chosen to reside in the country of his origin is no longer an American citizen, there will be no demands for assistance by the United States, no potentiality for bringing it in conflict with the other country or embarrassing it in the conduct of its foreign relations. There will be no attempted exploitation of his American citizenship. In short,

[19] Cf. Philippine Revised Naturalization Law, § 18(e), providing for expatriation of a naturalized citizen who "has allowed himself to be used as a dummy in violation of the Constitutional or legal provision requiring Philippine citizenship as a requisite for the exercise, use or enjoyment of a right, franchise or privilege" (*Laws Concerning Nationality* (U.N. 1954), p. 385).

[20] The diplomatic background of Section 352(a)(1) demonstrates that "mere residence" by a naturalized citizen in the country of his origin is not a "neutral act," as petitioner contends (Pet. Br. 47–52), but is an act well calculated to bring embarrassment upon the United States and to embroil it with other nations. Even Judge Edgerton, dissenting in *Lapides* v. *Clark*, 176 F. 2d 619 (C.A.D.C.), certiorari denied, 338 U.S. 860 (see pp. 13–14, *supra*), recognized that "mere residence" abroad could have sufficiently significant consequences for this Nation that Congress might attach expatriation to it: "Congress may expatriate citizens on reasonable grounds. *No doubt these may include five years residence abroad*" (emphasis supplied) (176 F. 2d at 623).

"[t]he termination of citizenship terminates the problem" (*Perez* v. *Brownell, supra*, 356 U.S. at 60).

There is another connection between expatriation and the regulation of foreign relations that should be mentioned in connection with this provision. As we have noted, the Congress that passed the Nationality Act of 1940 (the statute that brought Section 352(a)(1) to its present form) was greatly concerned with problems of dual nationality and was determined to reduce them to the minimum (see p. 29, *supra*).[21] Expatriation of naturalized persons who reside at length in the country of their origin serves this end in two ways. First, many of these persons are themselves dual nationals, either because their native land never released them from allegiance[22] or because their resumption of residence there had the effect of repatriating them (by operation of domestic law[23] or by treaty[24]); their expatriation by the United States would terminate their dual nationality. Second, as the 1938 cabinet committee, the State Department's witness and the sponsor of the 1940 Act recognized,[25] it is not unlikely that persons taking up lengthy residence in countries with

[21] Cf. *Savorgnan* v. *United States*, 338 U.S. 491, 500.

[22] Natural-born citizens of some countries, such as the United Kingdom and Israel, do not lose their original nationality upon becoming naturalized as United States citizens.

[23] For example, an Italian who has lost his Italian citizenship by foreign naturalization automatically reacquires it by two years' residence in Italy (see *Laws Concerning Nationality* (U.N. 1954), p. 269).

[24] See, *e.g.*, the American naturalization treaties discussed at pp. 18–19 and note 10, *supra*.

[25] See pp. 26, 28, 29, *supra*.

which they have prior attachments will have children there; these children will normally be dual nationals,[26] and, what is more, it is extremely probable that they will develop far stronger attachments to the foreign country of their birth and residence than to the United States.

While, of course, the rationality of the connection between a problem and its solution depends, to some extent, upon what alternatives were available to Congress, this Court has pointed out (*Perez* v. *Brownell*, *supra*, 356 U.S. at 60):

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose.

Nothing emerges more clearly from the diplomatic and legislative background of Section 352(a)(1) than that Congress felt that every other reasonable mode of dealing with the problem at hand had been exhausted and that expatriation was the only practicable alternative available.

The denial of diplomatic protection or other relief had been repeatedly attempted; however, both the 1906 State Department board and the 1938 cabinet committee pronounced it unsatisfactory (see pp. 22, 25, 26, *supra*). It was considered unfair to the individual that his right to protection should be indefinite and unpredictable. Moreover, it was considered embarrassing to this country vis-a-vis other countries that

[26] This is the case with respect to petitioner's children. See pp. 5–6, *supra*.

the right of American citizens to diplomatic protection was anything less than absolute; failure of this country to give protection in some instances made it more difficult to enforce it in others. A solution by means of naturalization treaties had been attempted, but many countries had proved unwilling to enter into such agreements (see pp. 18–19, *supra*). A statutory presumption of expatriation had been attempted, but this, too, was found inadequate and difficult to administer (see pp. 24–25, 26, *supra*). It was not until all of these remedies had been tried and found wanting that Congress resorted to outright expatriation. Its judgment that this was the only feasible solution open to it was, we submit, entirely reasonable.[27]

It is argued that Congress should have selected a more restricted class for the application of this provision (Pet. Br. 39).[28] However, diplomatic history provided a fully adequate basis for the classification adopted by Congress. There was more than ample evidence that naturalized citizens taking up protracted residence in the country of their origin were the principal source of the problem of maintaining satisfactory international relations in the face of demands for protection and other relief. Certainly it is fair

[27] Not without relevance to the reasonableness of this choice is the fact that a number of other countries provide for the expatriation of naturalized (or "registered") citizens upon their extended residence in the country of their origin (Canada, Cuba, El Salvador, Guatemala (?), Liberia (presumption), Mexico, see *Laws Concerning Nationality* (U.N. 1954), pp. 76, 109, 146, 289, 308; as to Guatemala, compare p. 200 (constitutional provision) with p. 206). See also note 48, *infra*.

[28] Petitioner also argues, in effect, that Congress should have selected a *broader* class (see pp. 44; 49–50, *infra*).

to say that no narrower class was clearly suggested by that history. As in the *Perez* case, *supra*, "[t]he classification that Congress has adopted cannot be said to be inappropriate to the difficulties to be dealt with" (356 U.S. at 60).[29]

Furthermore, Congress has carefully and conscientiously narrowed the class to which the statute applies by providing numerous exceptions covering those groups who, as experience had shown, were least likely to be the cause of international problems (see pp. 3–5, *supra*). Thus, persons employed by the United States government or United States firms are excepted:[30] their open and obvious connection with this country

[29] It would seem that any narrower class (such as that suggested by petitioner, "naturalized citizens who travel to a country which does not recognize their naturalization," Pet. Br. 39) would have to depend upon the ever-changing policies and laws of other countries; it would thus make a citizen's status perilously unpredictable and would pose what has been found to be a difficult administrative problem (see S. Rep. No. 1515, 81st Cong., 2d Sess., p. 767). Moreover, such legislation might well engender antagonisms with the isolated nations to which it had application, presenting still further international complications.

The suggestion of the *amicus* (ACLU Br. 35)—that, in view of the problems it was designed to meet, Section 352(a)(1) should have been limited in application to males—is without substance. Women were by no means exempt from the various pressures (such as trial for political offenses) that gave rise to demands for protection (see pp. 16–17, *supra*; see also, *e.g.* Case of Cecilia C. Gaertner, 3 Moore, *Digest of International Law* (1906), p. 646). Moreover, even if conscription into the armed forces were the only problem that gave rise to demands for protection, there are countries that conscript women into their armed forces, and there is nothing to prevent others from doing so in the future.

[30] Section 353 (1), (4), 66 Stat. 270, 8 U.S.C. 1485 (1), (4).

will tend to discourage inconsistent demands upon them; moreover, their stays are less likely to prove permanent. Certain aged and disabled persons are excepted:[31] their disabilities greatly reduce the likelihood that demands will be made upon them; furthermore, they are less likely to have children, thus aggravating the problems Congress sought to avoid. Persons who are abroad for education or for certain emergency reasons (such as family illness) are excepted:[32] the temporary character of their sojourn reduces the chances that they will cause any international conflict. Congress was not required to make further minute distinctions; the classification it established (as further limited by the express exceptions) came as close to describing the most probable source of international complications as could reasonably be expected."[33]

Nor was Congress required to limit the application of the statute to those whose residence abroad actually causes international difficulties. As this Court pointed out in the *Perez* case, Congress must have latitude to regulate matters affecting the foreign affairs of this country "on more than an *ad hoc* basis" (356 U.S. at 59). Thus, the Court in that case did

[31] Section 353 (2), (3), (5), 66 Stat. 270, 8 U.S.C. 1485 (2), (3), (5).

[32] Section 353 (5), (6), 66 Stat. 270, 8 U.S.C. 1485 (5), (6).

[33] Petitioner's discussion of the exceptions to Section 352 (Pet. Br. 29–31), is almost entirely devoted to Section 354, which contains the exceptions to Section 352(a)(2), a provision not at issue in this case. It is Section 353 that contains the exceptions to the provision (Section 352(a)(1)) involved in this case.

not restrict Congress to providing for loss of nationality only with respect to foreign voting that in fact stirred up an international controversy. Such an approach, if applied prospectively, would call for predictions that could not possibly be made with any accuracy; if applied retrospectively, it would have the vice of dealing with the problem only after the damage had been done. An *ad hoc* approach would, moreover, pose substantial administrative difficulties and would introduce significant uncertainties into the citizen's status. Manifestly, individualized treatment is not required in relation to such a general problem as the conduct of international affairs.[24]

B. SECTION 352(a)(1) MAY ALSO BE SUSTAINED AS AN EXERCISE OF THE POWER OF CONGRESS OVER UNITED STATES CITIZENSHIP

The United States, as a sovereign Nation, has the undoubted power to regulate its own national citizenship. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668; *Mackenzie* v. *Hare*, 239 U.S. 299, 311. Moreover, as this Court recognized in *Luria* v. *United States*, 231 U.S. 9, 22, there is an inescapable relation-

[24] Petitioner also argues that Section 352(a)(1) infringes upon the citizen's "right to travel" (Pet. Br. 13, 22, 32–33, 52–53). Plainly enough, however, the statute does not in any way affect the right or freedom of any person to travel where he will, when he will; it touches only prolonged *residence* in a single foreign country. Furthermore, whether viewed as a restriction on foreign residence or foreign travel, it is a reasonable restriction arising out of the necessities of international relations. Nothing in this Court's decision in *Kent* v. *Dulles*, 357 U.S. 116, suggests that reasonable restrictions on the right to travel are beyond the power of Congress to authorize (see 357 U.S. at 127).

ship between citizenship and the citizen's allegiance to his country:

> Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. * * *

It follows, we submit, from these premises, that it is within the power of Congress to terminate a person's American citizenship where his conduct manifests a withdrawal or transfer of his United States allegiance.[35]

This view seems to have been adopted in *Perez* v. *Brownell*, 356 U.S. 44, 60–61, where this Court observed that Congress had interpreted the conduct involved there (voting in a foreign election)

> as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

We do not read that statement, as does petitioner (Pet. Br. 47–52), to mean that only acts from which a withdrawal or transfer of allegiance can be inferred may be the subject of expatriation legislation.[36] As we read the Court's opinion, this fact was cited as suggesting an additional source of congressional

[35] This point has previously been discussed at somewhat greater length in our brief in *Kennedy* v. *Mendoza-Martinez*, No. 2, this Term, at pp. 47–51.

[36] Compare, for example, *Mackenzie* v. *Hare*, *supra*, where the act in question was marriage to a foreigner.

power—the power to regulate citizenship (and with it, the authority to deal with serious compromises of allegiance)—in support of the legislation at issue there. However that may be, we believe that the conduct at issue here (prolonged residence by a naturalized citizen in the country of his origin) has the same elements adverted to by the Court in the *Perez* case.

Congress long ago committed this Nation to the policy that, when a person assumes allegiance to the United States by naturalization, he should thereafter maintain his permanent residence in this country. Thus, he is required in applying for naturalization to establish his intention to reside in the United States permanently. 34 Stat. 597 (1906); see 66 Stat. 259, 8 U.S.C. 1449. And, as we have noted,[37] permanent residence by a naturalized citizen in a foreign country within five years of naturalization is *prima facie* a ground for denaturalization. 34 Stat. 597, now 66 Stat. 260, 8 U.S.C. 1451(d).

It is perfectly clear that both the 1938 cabinet committee on which Congress relied and Congress itself regarded protracted residence by a naturalized citizen in the country of his birth or former nationality as importing a serious compromise of his allegiance. The cabinet committee, for example, observed that such residence "has rendered it difficult to make fully effective the principle, which this Government has long sought to maintain, that naturalization involves a complete change of national character and termination of prior allegiance." Nationality Laws

[37] See p. 21, *supra*.

of the United States, 1938, part I, House Committee Print, 76th Cong., 1st Sess., p. 71. The committee went on to explain (*ibid.*):

> Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated."[38] * * *

In its letter of transmittal to the President, the committee explained that a basic purpose of all of the proposed expatriation provisions was "to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States" (Nationality Laws of the United States, part I, *supra*, at p. vii). It also stated, after observing that naturalization is conditioned on an intention to reside in this country permanently, that (*ibid.*)

> When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow.

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[38] See also testimony of Mr. Flournoy, quoted at pp. 27–28, note 15, *supra*.

The Senate report on the bill that became the Nationality Act of 1940 had this to say (S. Rep. No. 2450, 76th Cong., 3d Sess., p. 4):

> These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country. * * *

During the debates Chairman Dickstein emphasized the purpose of the bill to terminate the citizenship of "those who reside in foreign lands and only claim citizenship when it serves their purpose" (86 Cong. Rec. 11944), and the bill's sponsor, Rep. Rees, observed that a naturalized person residing in his native land "is not likely to have any real attachment to the principles of the Constitution of the United States" (86 Cong. Rec. 11948). In all of these statements, those responsible for the development and passage of the provision at issue here were expressing their considered view that a naturalized citizen's returning to reside permanently in the country of his origin shows not only a lack of allegiance to this country but the reestablishment of a relationship with another country that is inconsistent with American citizenship.

This view, we submit, was "not irrationally" entertained (see *Perez* v. *Brownell, supra,* 356 U.S. at 61). A leading authority on the foreign affairs of the United States has stated (Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 701):

> The tie which binds the naturalized citizen to his adopted country has always been recognized as more easily dissoluble than that which binds the native citizen to his country. * * *

When the naturalized citizen resumes permanent residence in the country of his origin, the pressures and temptations to revert to his old allegiance will be strong, indeed. He will often be surrounded by family and old friends whose only tie is with the native land.[39] Frequently he will marry a native, and his children will be born and raised there with no real connection to his adopted country. He will generally resume such habits of living as the language and customs of the native land.[40] He will normally be dependent for his livelihood on the economy of the country in which he resides.

Surely it was reasonable for Congress to conclude that the native's reversion to a supposedly abandoned way of life would put such a strain on his American allegiance that it could not normally be expected to survive. By the same token, Congress was warranted

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[39] Secretary of State Fish observed in 1873 (Fish to Grant, Aug. 25, 1873, 2 For. Rel. 1873, p. 1190) that

> while the principle on which rests the right of protection while in foreign countries of the naturalized is the same with that of the native-born citizen, there is an appreciation of the strong proclivity to resume his original citizenship on the part of him who, having wandered from home, returns to find the attractions of early associations and of family ties enticing him * * *.

[40] A recent writer has made note of "the fact that nationals living abroad tend to dissociate themselves from the national life of their State and are likely to lose the characteristics normally expected of a national" (Bar-Yaacov, *Dual Nationality* (1961), p. 261).

in concluding that his allegiance to his native land might be significantly revived. Accordingly, we submit, it was a reasonable exercise of the congressional power to regulate citizenship and to deal with serious compromises of allegiance for Congress to make protracted residence in the land of his origin an expatriating act for the naturalized citizen.

II. CONGRESS DID NOT UNJUSTIFIABLY DISCRIMINATE IN MAKING AN EXPATRIATING ACT APPLICABLE ONLY TO NATURALIZED CITIZENS

Petitioner contends that Section 352(a)(1) violates the due process clause of the Fifth Amendment[41] because it discriminates "invidiously" as between natural-born and naturalized citizens of the United States. Of course, there is nothing in the Constitution expressly prohibiting differentiations between these two classes of citizens. Indeed, the Constitution draws several such distinctions itself. Thus, only a natural-born citizen may become President. Art. II, Sec. 1. A naturalized citizen must wait at least seven years after he obtains his citizenship before he is eligible to sit in the House of Representatives, Art. I, Sec. 2, and he must wait at least nine years before he can sit in the Senate. Art. I, Sec. 3.

[41] She does not seem to place substantial reliance on the first sentence of the Fourteenth Amendment (see Pet. Br. 3, 12 *et seq.*; she adverts to it only briefly at Pet. Br. 25). As this Court stated in *Perez* v. *Brownell*, 356 U.S. 44, 58, n. 3, "there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship."

The test under the Fifth Amendment is whether the classification in question has a foundation in reason. As the Court pointed out in *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (cited at Pet. Br. 21–22), "discrimination may be *so unjustifiable* as to be violative of due process" (emphasis supplied). But, as the quotation implies, not all differentiations are banned. This Court has many times upheld distinctions that would be at least as odious as that between natural-born and naturalized citizens, had they not a basis in reason. See, *e.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (ancestry); *Mackenzie* v. *Hare*, 239 U.S. 299 (sex). See also *Terrace* v. *Thompson*, 263 U.S. 197; *Heim* v. *McCall*, 239 U.S. 175; *Porterfield* v. *Webb*, 263 U.S. 225; *Clarke* v. *Deckebach*, 274 U.S. 392. In each of these cases, the Court sustained differentiations of treatment as among different classes of persons upon a showing that the classification was reasonably devised to meet a demonstrated need.

Indeed, this Court has itself recognized the validity of distinctions between different classes of citizens on the basis of foreign residence. Thus, the Court in *Perkins* v. *Elg*, 307 U.S. 325, 329–30, noted with apparent approval that a child born in this country of alien parents who subsequently returned to the country of their origin would lose his natural-born American citizenship if he did not (1) make an election upon reaching majority, and (2) return to the United States to assume the duties of citizenship; on the other hand, of course, a natural-born child of citizen parents could be taken abroad shortly after birth and would never have to take these affirmative

steps in order to retain his American citizenship. The citizenship laws of this country contain a number of such differentiations as between classes of natural-born citizens, none of which seems open to serious question. Thus, a foreign-born child of one citizen parent and one alien parent, though a natural-born citizen of this country, loses that citizenship if he fails to come to the United States prior to the age of twenty-three to live for a least five continuous years;[42] foreign-born citizens of two citizen parents have no such affirmative obligation. A natural-born citizen of dual nationality loses his citizenship if he resides for three years in the country of his other nationality after the age of twenty-one unless, prior to the expiration of the three-year period, he takes an oath of allegiance before an American diplomatic or consular official;[43] no such disability attaches to natural-born citizens who do not happen to have another nationality.

The drawing of lines between natural-born and naturalized citizens in connection with foreign residence has a basis in well over 100 years of history in this

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[42] 66 Stat. 235, 8 U.S.C. 1401 (a)(7), (b). To qualify under this provision the citizen parent must have resided in the United States for ten years, five of which were after the age of fourteen. Petitioner Schneider's children are governed by this provision (see p. 6, *supra*).

[43] 66 Stat. 269, 8 U.S.C. 1482. To become subject to this provision the dual national must also have "voluntarily sought or claimed benefits of the nationality of any foreign state." Presumably, petitioner Schneider's children could be subject to this provision (see pp. 5–6, *supra*).

There are, of course, other provisions relating to loss of nationality that apply only to dual nationals. See 66 Stat. 267, 8 U.S.C. 1481 (a)(4)(A), (b).

country's diplomatic practice (see pp. 17–20, *supra*). As a general rule, only naturalized citizens were administratively denied rights of citizenship solely on grounds of residence abroad (*e.g.*, Wheaton to Knoche, July 24, 1840; Fish to Mintz, Feb. 1, 1870, both cited at p. 17, *supra*), and, where other grounds were also involved, different standards were applied to naturalized citizens than to the natural-born (see p. 19 and note 11; *supra*). For nearly 100 years, our naturalization treaties have provided for expatriation of naturalized citizens alone upon the basis of foreign residence (see pp. 18–19, *supra*). Legislation dealing with these matters on the basis of a distinction between naturalized and natural-born citizens was first enacted over half a century ago (see pp. 22–23, *supra*).

It is also noteworthy that a great many other countries draw sharp distinctions in their nationality laws between natural-born and naturalized citizens. The reason for these distinctions was recently set forth by the delegate of the United Kingdom to an international Conference on the Elimination or Reduction of Future Statelessness: "

> The natural-born person had a birth right to his nationality: but the naturalized person was expected to justify his acquisition of nationality by a higher standard of behaviour and States should have greater freedom to deprive him of his nationality.

It is not surprising, then, that the United Kingdom is notable among the nations that have grounds for

" Summary Record of the 15th Meeting of the Committee of the Whole, U.N. Conference on the Elimination or Reduction of Future Statelessness (U.N. 1961), p. 10.

expatriating naturalized citizens that are not applicable to natural-born citizens (*Laws Concerning Nationality* (U.N. 1954), pp. 475–476)."[45] Other nations drawing a similar line[46] are Argentina, Australia, Brazil, Canada, Ceylon, Costa Rica, Cuba, Ecuador, El Salvador, France, Guatemala, Honduras, Israel, Jordan, Lebanon, Liberia, Luxembourg, Mexico, New Zealand, Nicaragua, Pakistan, Paraguay, Peru, Philippines, South Africa, Southern Rhodesia, Thailand, and Turkey."[47] In most instances, foreign residence is among the grounds applicable only to naturalized citizens."[48]

The lack of arbitrariness in Congress's making the act of expatriation involved here—protracted resi-

[45] Indeed, in Great Britain, only naturalized and "registered" citizens can be expatriated.

[46] Sometimes applicable to other categories of non-natural-born citizens such as "registered" citizens.

[47] *Laws Concerning Nationality*, *supra*, at pp. 19–20, 57, 76, 86–87, 103, 104, 109, 135, 144, 146, 165, 206, 218, 265–266, 280, 287, 289, 304, 308, 346, 352, 364, 376, 377, 385, 410–411, 427–428, 457, 461, 475–476; *id.* (Jan. 1955 Supp.) at p. 3 (Argentina). In some instances, the provision is expressed in terms of the revocation or cancellation of naturalization, but they are more analogous to expatriation than to denaturalization as we know it, since they are unlimited in point of time and do not relate in any way to the acquisition of citizenship.

[48] These provisions are, of course, variously qualified; for example, in some instances, the requisite period may be tolled by the filing of a declaration; in a few, foreign residence creates a rebuttable presumption. As we have noted (see note 27, *supra*), the laws of a number of these countries specify residence by a naturalized citizen in the country of his origin as an expatriating act.

A very few countries make residence abroad an expatriating act for any citizen. *E.g.*, France (residence in foreign country where ancestors have lived for 50 years); Pakistan, Yugoslavia (*Laws Concerning Nationality*, *supra*, at pp. 164, 364–365, 557).

dence in country of origin—applicable only to naturalized citizens is readily apparent from the diplomatic background of Section 352(a)(1) (see pp. 16–30, *supra*). Long and sometimes bitter experience had demonstrated that such conduct was "potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations,"[49] and that it was so *because* the individual had an intimate prior connection with the country of residence: birth there or former nationality or both. Thus, it was the fact that the individual *was a naturalized citizen*—and hence, by hypothesis, was born in another country and had possessed (indeed, perhaps still possessed) the nationality of that country—that made his residence in the country of his origin a likely source of international conflict.[50]

Having determined that the problem of protracted residence by naturalized citizens in the country of their origin required legislative resolution, was Congress required to legislate with respect to a larger group? Was Congress, in the name of "equality" or of what Mr. Justice Holmes referred to as "abstract

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[49] *Perez* v. *Brownell*, *supra*, 356 U.S. at 60.

[50] There were other circumstances indicating that naturalized citizens were a particularly fruitful source of foreign relations problems—the fact, for example, that as a class they travel abroad far more than native citizens. This fact was noted by the State Department Citizenship Board in 1906 (see p. 22, *supra*) and is amply demonstrated by current figures. In 1960, 1 in every 47 naturalized citizens received a passport, while only 1 in every 237 native citizens did so; considered another way, while naturalized citizens made up only 3.7 percent of the population, they received 16.7 percent of the passports issued (figures supplied by Department of State).

symmetry" (*Patsone* v. *Pennsylvania*, 232 U.S. 138, 144), required to say that *no* citizen—natural-born or naturalized—could reside abroad for more than a given period without expatriating himself![51] Plainly not, in view of the fact that experience had shown what is obvious: that the problem of *naturalized* citizens residing in the country *of their origin* has far greater potential for causing international problems than foreign residence by citizens under other circumstances. Congress may legislate with respect to one problem at a time; it "may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States, supra,* 320 U.S. at 100; *United States* v. *Petrillo,* 332 U.S. 1, 8–9; *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489; *Patsone* v. *Pennsylvania, supra.*

In this connection, we point out that Congress, in dealing with other problems of foreign residence, *has* recognized that not all are of the same degree of seriousness. Thus, residence by a naturalized citizen in a country other than the one of his origin is somewhat less likely to cause the kind of problem with which Congress was most concerned; therefore, the period of residence before expatriation takes place is five years instead of three, and the exceptions to this five-year provision are much broader than those applicable

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[51] As we have noted, a very few countries provide for the expatriation of both natural-born and naturalized citizens for foreign residence (see note 48, *supra;* cf. note 53, *infra*).

to the three-year provision involved in this case.[52] Similarly, certain classes of foreign-born persons who are citizens at birth are considered to be a sufficiently potential source of difficulties (albeit less so than naturalized citizens) that they are subject to certain disabilities and requirements in relation to residence abroad (see p. 46, *supra*).[53] Plainly, Congress may thus legislate in proportion to the problem perceived; it may attach grave consequences to what it considers to be the most serious and troublesome conduct and lesser consequences to conduct not deemed to be of equal danger. *E.g., Hirabayashi* v. *United States, supra; Williamson* v. *Lee Optical of Oklahoma, Inc., supra.* Indeed, it would be irrational for Congress to act otherwise.

There is nothing "invidious" about the distinction Congress made when it enacted Section 352(a)(1) (see Pet. Br. 27–31), nor does that distinction brand naturalized citizens as an "inferior group of citizens" (Pet. Br. 27). It simply recognizes, on the basis of experience and history, that naturalized citizens—through no real fault of their own—are very likely

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[52] Sections 352(a)(2), 354, 66 Stat. 269, 271, 8 U.S.C. 1484 (a)(2), 1486. Illustrative is the fact that petitioner would have been free to reside permanently in a country other than Germany (the country of her origin) because she qualifies under one of these broader exceptions (see Pet. Br. 13–14, n. 2).

[53] A small handful of countries provide for the expatriation of *foreign-born* citizens (whether natural-born or naturalized) on the basis of protracted foreign residence. *E.g.*, Netherlands (time tolled by notice of intention to remain Netherlander), Norway (applies to one who never resided in Norway), Sweden (applies to one who never lived in Sweden under circumstances indicating a connection) (*Laws Concerning Nationality, supra*, at pp. 324, 354, 441).

to create international problems when they reside at length in the country of their origin, and that they are far more likely to do so than other citizens residing abroad. Congress, seeking in good faith to avoid such problems, perforce had to focus on the group whose conduct gives rise to them, but it did not do so "invidiously." In effect, it called upon all naturalized citizens either to cooperate with this, their adopted country, by not putting themselves in a position where they are likely to bring it in conflict with other Nations, or to accept the only alternative calculated to resolve any difficulties that might attend their refusal thus to cooperate: termination of their citizenship. That they must make this choice is no reflection on their "loyalty" or "reliability" (see Pet. Br. 27); it is dictated by the hard facts of experience in the foreign relations of this country.

It is relevant, too, in considering the reasonableness of the classification adopted in Section 352(a)(1), that, generally speaking, its effects are far less severe as applied to naturalized citizens than they would be as applied to natural-born citizens. In many instances, the naturalized citizen will also be a citizen of the country of his origin, so that he will not be rendered stateless; in most other instances (as in this case), his peculiar connection with that country will make it easier for him to obtain its citizenship.[44] In any event, the fact of his birth or former citizenship (or both) there will ordinarily mean that he

[44] Thus, as we have noted (and as petitioner concedes), petitioner could easily obtain German citizenship because of her husband's German nationality. See p. 6, *supra*; see also Pet. Br. 38, n. 15.

has family connections and old friends there, speaks the language, understands the customs—in short, that he will find it relatively easy to become reassimilated into the population from which he originally sprang and to which he has chosen to return. By contrast, the natural-born American citizen would usually have few if any of these special associations other than those he might have accumulated during the period of residence prescribed in the statute. He would be in a markedly more difficult position to pick up the threads of a normal existence in a new country.

In sum, it was not an unreasonable discrimination for Congress to make Section 352(a)(1) applicable only to naturalized citizens. As we have shown, the reasonableness of this classification is incontrovertibly established by a long diplomatic history during which serious international problems arose out of the residence of such individuals in the country of their origin—problems substantially more serious than any stemming from the foreign residence of other citizens. Moreover, there is ample precedent, in the diplomatic and legislative practice of this and other countries and, indeed, in the decisions of this Court, for the establishment of such a classification. It was on the basis of this Court's decision in *Mackenzie* v. *Hare*, *supra*, that the court below, in *Lapides* v. *Clark*, 176 F. 2d 619, 621 (C.A.D.C.), certoriari denied, 338 U.S. 860, found the very classification involved in this case [55] to be reasonable:

[55] That case was concerned, of course, with the five-year provision for residence by a naturalized citizen in any foreign country, rather than the three-year provision at issue here; the principles announced there, however, are no less applicable here. See pp. 13-14, *supra*.

> The distinction [drawn in the *Mackenzie* case] between female citizens marrying Americans and those marrying foreigners was held not to be an arbitrary exercise of power, as it was dictated by a policy to avoid embarrassments and controversies with foreign governments. *In view of this decision, supporting classification as between native born citizens, we cannot doubt that for a similar purpose Congress has the power to distinguish between native born and naturalized citizens* * * *. [Emphasis supplied.].

For the reasons we have set forth, we submit that this carefully considered conclusion is unassailable.

III. SECTION 352(a)(1) IS NOT PENAL

Petitioner's contention (Pet. Br. 53–56) that Section 352(a)(1) imposes punishment (and that, in turn, such punishment is cruel and unusual in violation of the Eighth Amendment) is so far wide of the mark as to require but little comment.[56] This statute, providing that naturalized citizens shall lose their citizenship upon three years' residence in the foreign country of their origin, is no more "penal" than Section 349(a)(5),[57] which attaches expatriation to voting in a foreign election. The direct predecessor of that provision was sustained as a valid exercise of Congress's foreign affairs power in *Perez* v. *Brownell*, 356 U.S. 44, and not even the dissenting Justices sug-

[56] The *amicus* does not make this argument.

[57] 66 Stat. 267, 8 U.S.C. 1481(a)(5).

gested that the provision could be considered as in any sense penal. The same is plainly true here.[58]

While petitioner quotes the opinion of the Chief Justice in *Trop* v. *Dulles*, 356 U.S. 86, 96, to the effect that "[t]he controlling nature of such statutes normally depends on the evident purpose of the legislature," she does not point to a single word in the legislative history that would suggest a penal purpose behind the enactment of Section 352(a)(1) by Congress. Nor could she have done so, for the whole background of the provision—diplomatic and legislative—makes unmistakably clear that the dominant purpose of the State Department in seeking this legislation and of Congress in enacting it was to regulate the foreign affairs of the United States (see pp. 16–30, *supra*). Not so much as a hint of penal intent crept into the deliberations on this provision or any of its antecedents.

Petitioner appears to make three arguments in support of her "punishment" point: first, that the statute is penal on its face because it is obviously intended to deter (Pet. Br. 54); second, that the exceptions to the statute demonstrate its penal character because they have no valid regulatory purpose (Pet. Br. 54–55); and, third, that the statute is penal because the act to which it attaches expatriation cannot be considered as a "voluntary" divestiture of citizenship (Pet. Br. 55–56). Each of these arguments is manifestly unsound.

[58] The standards for determining whether expatriation legislation imposes punishment are discussed at some length in our brief in *Kennedy* v. *Mendoza-Martinez*, No. 2, this Term, at pp. 53–59. Petitioner does not seem to dispute the conclusions there drawn.

Presumably any statute that attaches undesirable consequences to a certain form of conduct will have the incidental effect of deterring individuals from engaging in that conduct. That fact, however, does not make the statute "penal" for any legally relevant purpose where there is a valid non-penal design behind it. See *e.g., Helvering* v. *Mitchell,* 303 U.S. 391, 399–401; *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 554–555; *Rex Trailer Co.* v. *United States,* 350 U.S. 148. As we have pointed out, if not the face of the statute, then unquestionably its legislative history makes it plain that citizenship is withdrawn under the conditions stated in Section 352(a)(1) because its retention, under those conditions, is a source of potential embarrassment in the conduct of foreign relations.

Contrary to petitioner's second contention, the legitimate congressional purpose behind the exceptions to Section 352(a)(1) (which are contained in Section 353[39]) is apparent from their face. Their enactment constituted a good-faith effort on the part of Congress to confine the application of Section 352(a)(1) by excepting from it those groups who, by virtue of age, employment, physical condition or other similar circumstance, were least likely to cause the international problems to which the statute was directed (see pp. 36–37, *supra*). These exceptions thus underline, rather than detract from, the manifest purpose of Section 352(a)(1) to accomplish a valid regulation of the foreign affairs of the United States.

[39] 66 Stat. 270, 8 U.S.C. 1485.

It is not clear how petitioner's third argument—that Section 352(a)(1) imposes consequences which petitioner "did not invite or seek by any voluntary act" (Pet. Br. 56)—is thought to produce a conclusion that the statute is "penal" in character. In any event, however, as we have pointed out (see pp. 14–15, *supra*), petitioner's decision to remain in the country of her origin for more than three years was a purely voluntary act on her part: that she did not "intend" *i.e.*, desire, that act to result in the loss of her citizenship is, of course, irrelevant. Congress having validly declared that one who voluntarily engages in such conduct is considered as having expatriated himself, petitioner did indeed "invite" that consequence when she willingly chose to remain permanently in the land of her birth.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Petitioner, in its principal brief, has shown that Section 352(a)(1) of the Immigration and Nationality Act of 1952, pursuant to which petitioner is sought to be deprived of her citizenship fails to meet constitutional standards principally for two reasons.

(1) It violates the Fifth Amendment because it discriminates between petitioner and other citizens of the United States on the sole basis that petitioner acquired her citizenship by naturalization rather than by birth. This discrimination, as pointed out in petitioner's principal brief, affects fundamental personal rights and is contrary to the basic American proposition that all

citizens, regardless of national origin, must be treated equally.

(2) Even if it were not discriminatory the challenged legislation violates due process because it is arbitrary. Congress can provide for the withdrawal of American citizenship only in cases where the citizen commits an act inconsistent with his American citizenship. Mere residence abroad is, of course, not inconsistent with American citizenship, and has not been so regarded by Congress so far as native-born citizens are concerned.

The principal argument the Government advances to the contrary is that the residence abroad of naturalized citizens may raise problems in the conduct of foreign affairs and cause administrative difficulties. Therefore, the Government urges, Congress may terminate the citizenship of naturalized citizens residing abroad even though such residence is an act in no way inconsistent with American citizenship. Further the Government suggests the residence abroad of naturalized citizens is inconsistent with American citizenship because naturalized citizens who reside abroad may reasonably be regarded to have abandoned their allegiance to the United States. As shown below, these suggestions violate the Fifth Amendment.

SUMMARY OF ARGUMENT

The Government erroneously assumes that Congress has the power to expatriate citizens as a means of solving administrative problems. But the cases of *Mackenzie*, *Savorgnan* and *Perez* show that Congress can constitutionally compel expatriation of a citizen only for an act which is inconsistent with American citizenship. Residence abroad is clearly not such an act, as shown by the facts in this case, and by the

failure of Congress to make residence abroad an expatriating act for native-born citizens.

Nor can Congress substitute for an act inconsistent with allegiance to this country a conclusive presumption that naturalized citizens residing abroad *as a group* have abandoned their allegiance to the United States.

Underlying that contention, and running through the Government's entire brief, is the assumption that naturalized citizens as a class are less loyal than the native-born and are therefore more likely to abandon their allegiance to the United States. Not only is this assumption unwarranted, but it is completely contrary to the constitutional requirements of due process. Congress may attach to a particular *act* connoting lack of allegiance the consequence of expatriation. But Congress may not enact legislation on the theory that one group of citizens—*as a group*—is more likely to lack allegiance than another. Group legislation, particularly when based on such factors as national origin, is not permitted under the Constitution. See *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

Congress cannot create a class of citizens of probation or subject to special restrictions on the basis of the means by which they acquired their citizenship. Once a person has become a citizen of the United States, be it by birth or naturalization, his rights as a citizen are the same as those of every other citizen.

The Government urges that the legislation attacked is an appropriate means to deal with foreign affairs problems caused by the residence of naturalized citizens in the country of their origin because that country might make demands on them. The Government relies

principally on the diplomatic history of the middle of the last century when naturalized citizens were being drafted into military service by the countries of their former nationality. But these problems were no longer existent when Congress enacted the challenged legislation in 1940 and were not the basis for this legislation.

Congress enacted this legislation, as the legislative history indicates, not because it felt that naturalized citizens residing abroad caused more problems than native-born, but rather because it felt that many naturalized citizens were nominal citizens who had no real attachment to the United States. On this basis, however, the challenged legislation cannot be sustained because it assumes such a conclusion is applicable to all naturalized citizens living abroad regardless of the allegiance of the individual naturalized citizen to which it applies.

Congress was required to deal with actual problems and to limit its measures to such as might be appropriate to deal with such problems. *Perez* v. *Brownell*, 356 U.S. 44; Cf. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349.

The problems which the Government says may attend residence abroad of naturalized citizens are all problems of a special and limited character which could be dealt with by specific legislation (perhaps even in some cases withdrawing citizenship) without restricting broadly the rights of naturalized citizens.

Such problems may arise when a nation does not recognize American naturalization. But as the Government concedes almost all nations, including Germany where petitioner resides, recognize American naturalization. The problem of the country which does

not could undoubtedly be dealt with by specific legislation applicable only to residence in such a country. The existence of such a problem cannot justify removing citizenship in cases and countries where no such problem exists.

The Government further seeks to support the legislation as a measure designed to reduce the problem of dual nationality. This, however, is not a problem limited to naturalized citizens. Children of native-born citizens in the same situation as petitioner are also dual nationals.

I. Congress Has No Power to Terminate Citizenship to Ease Governmental Burdens and Responsibilities But Can Expatriate Only for Acts Inconsistent With the Retention of American Citizenship

Petitioner submits that Congress simply does not have the power to deal with purported problems and difficulties attending the residence abroad of naturalized citizens by expatriation. The Congressional power to expatriate is clearly limited to acts which are inconsistent with the continuing retention of American citizenship. Residence abroad is not that kind of an act.

The basic error in the Government's argument is that it assumes Congress has the power to terminate citizenship in order to ease governmental burdens and responsibilities.

Citizenship is not a right which may be freely sacrificed to governmental expediency. Once a person becomes a citizen, be it by birth or naturalization, that person is made an integral part of the body politic. The Government is committed to that citizen even if his citizenship should become a matter of embarrassment or difficulty. In return the citizen owes allegiance to

his country and is obligated to perform whatever duties of citizenship may properly be imposed on him no matter how difficult or embarrassing it may be to him. As this Court stated in *Luria* v. *United States*, 231 U.S. 9, 22:

> "Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. . . ."

So long as the citizen maintains allegiance he is entitled to his citizenship and also in most cases to have his country protect him, even if this should be troublesome to its officials. Petitioner's residence in Germany is of course in no respect embarrasing to this country.

A citizen may be deprived of his citizenship, as the decisions of this Court clearly demonstrate, only if he performs an act which reasonably may be deemed to be inconsistent with allegiance to this country. Such an act may be either the acquisition of a foreign citizenship or the performance of an act which shows such a degree of commitment to the political affairs of the foreign country that it may be deemed to be inconsistent with American citizenship. Residence abroad is, of course, not an act of this character.

There are only three cases in which this Court has sustained the withdrawal of citizenship under a statute. *Mackenzie* v. *Hare*, 239 U.S. 299, *Savorgnan* v. *United States*, 338 U.S. 491 and *Perez* v. *Brownell*, 356 U.S. 44. In *Mackenzie* and *Savorgnan* the expatriating act was one through which the citizenship of a foreign country was acquired. In *Perez* the act was one which the majority deemed to be inconsistent with

allegiance to the United States. Never has this Court sustained the withdrawal of citizenship on the basis of an act plainly consistent with American allegiance—such as mere residence abroad. Indeed, as petitioner's principal brief points out under II, *Perez* made clear that Congress was held to have the right to attach loss of citizenship to the act of voting there involved only because the Court believed the act could reasonably be regarded as establishing lack of allegiance to the United States.

In *Mackenzie* v. *Hare*, 239 U.S. 299, decided in 1915, the Court upheld the constitutionality of a statute which provided that an American woman who married a foreigner "shall take the nationality of her husband" and lose her American citizenship during coverture. At the time this case was decided a woman who married a foreigner became thereby a citizen of the husband's country.[1] Marriage to a foreigner at the time of this decision meant therefore the acquisition of a foreign citizenship. For this reason marriage to a foreigner was held to be inconsistent with the retention of American citizenship. Furthermore, the statute in *Mackenzie* deprived a married woman of her citizenship only during the existence of her marriage.

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[1] This was not only the law in the United States, but as counsel for Mrs. Mackenzie admitted "England and Continental countries have held for a long time to the doctrine of the merging of the identity of the wife with that of her husband. Under such a doctrine a wife was held not to have a citizenship separate and apart from that of her husband. (60 L. Ed. 298).

The statute involved in *Mackenzie* was repealed, perhaps in response to the command of the Nineteenth Amendment, by the Cable Act of 1922. 42 Stat. 1021.

Petitioner's marriage did not under either American or German law give her German citizenship or take away her American citizenship.

Upon its termination she was restored her rights of citizenship. This case has no application here since concededly neither petitioner's marriage nor her subsequent residence abroad made her a German national.

In *Savorgnan* v. *United States*, 338 U.S. 491, this Court upheld a statute attaching the withdrawal of United States citizenship to the act of becoming naturalized in a foreign country. Petitioner in that case acquired Italian citizenship and took an oath of allegiance to the King of Italy. This was clearly inconsistent with allegiance to the United States. Her principal defense was that even though she voluntarily acquired Italian citizenship, she did not do so with the intention of giving up her allegiance to the United States. This defense was rejected because expatriation is based upon the performance of an objective act and does not depend on the subjective intention with which such an act was performed. Here there is no inconsistent objective act like the oath of allegiance to the Italian King in *Savorgnan*, but rather only residence abroad which is consistent, as we have seen, with continued allegiance to the United States. Petitioner refers to the fact that she regards herself to be as an American simply to demonstrate that a citizen may reside abroad and yet remain loyal to his country. It is a meaningful statement of allegiance where the objective evidence, *i.e.*, refusal to take German nationality, supports the declaration and does not, like the oath of allegiance to th Italian King in *Savorgnan*, contradict it.

This Court's recent decision in *Perez* v. *Brownell*, 356 U.S. 44, has been analyzed in some detail un r Point II of our principal brief. There this Court, in a 5-4 decision, held that Congress, pursuant to its for-

eign affairs power, could take away the citizenship of a person who voluntarily voted in a foreign political election. The majority of the Court upheld the constitutionality of the statute because it felt that voting in a foreign political election could reasonably be held to connote both a lack of allegiance to the United States and allegiance to a foreign country. The minority dissented on the ground that voting in a foreign political election was not an act from which Congress could reasonably imply abandonment of American citizenship. There can, we submit, be no such difference of opinion with respect to the act of residing abroad. It is plainly consistent with continued allegiance to the United States.

Perez was the first case in which this Court has held that Congress may attach expatriation to an act which does not constitute an express renunciation of American citizenship by the acquisition of citizenship in a foreign country. In both *Mackenzie* and in *Savorgnan*, as we have seen, the citizen who was held to have expatriated himself had acquired a foreign nationality by the very act which was the basis of the expatriation. In *Perez* the majority held Congress could attach loss of citizenship to an act not resulting in the acquisition of foreign nationality if the act in question may be deemed inconsistent with American citizenship. Residence abroad plainly is not an act of this kind. Indeed, if it were Congress would surely have made residence abroad an expatriating act whether performed by a naturalized or native-born citizen.[2]

[2] The Government (Br. 14, n. 7, Br. 32, n. 20) cites the dissenting opinion of Judge Edgerton in *Lapides* v. *Clark*, 176 F. 2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 860, as authority for the proposition that residence abroad may be made an expatriating act. Judge Edgerton held that the legislation was unconstitutional because it

The limit on Congressional power in this field defined in *Perez* is, we submit, vital to the protection of the most basic personal rights from governmental intrusion. To permit Congress to expatriate only persons performing an act demonstrating such an involvement in the affairs of a foreign country as to be inconsistent with the retention of American citizenship is to place a clear and definable limit on Congressional power. But to say, as the Government urges, that a person may be expatriated if to do so helps overcome diplomatic or administrative difficulties gives Congress an almost unrestricted power to expatriate. It would make citizenship a right Congress can take away as readily as the right to engage in a particular type of business. It would mean giving Congress the power to regulate the activities of citizens by holding over them the threat of expatriation. It would make the citizen the creature of the State, a situation which is the very antithesis of free government.

II. The Challenged Legislation Cannot Be Sustained on the Unwarranted Assumption That Naturalized Citizens, as a Class, Are More Likely Than the Native-Born to Abandon Their Allegiance

The Government, apparently recognizing that under *Perez*, mere residence abroad, could not be made an expatriating act, makes the following untenable argument. It urges that this legislation can be sustained

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did not apply equally to naturalized and native-born citizens. His remark that "No doubt" foreign residence might be a ground for expatriation if equally applied to native-born and naturalized was a concession purely *arguendo* designed to emphasize his principal point that the discrimination here complained of is unconstitutional

We share the Government's respect for the views of Judge Edgerton and, unlike them, we are willing to extend our regard to the point accepting his conclusions.

under this Court's ruling in *Perez* because Congress could have reasonably concluded that

> "a naturalized citizen's returning to reside permanently in the country of his origin shows not only a lack of allegiance to this country, but the reestablishment of a relationship with another country that is inconsistent with American citizenship." (Br. 42)

We submit that there is plainly no rational basis for such a conclusion. Residence by a naturalized citizen in the country of his origin may be and often is for purposes consistent with continued allegiance to the United States. That residence abroad is not always inconsistent with American citizenship is plainly obvious from the facts of this case. The fact that petitioner married a citizen of a foreign country and resides abroad in the country where her husband practices his profession clearly cannot be said to mean that petitioner has abandoned her allegiance to the United States. This is highlighted by the fact that native-born American girls are not regarded as lacking in allegiance if they marry foreign nationals and live with them abroad the rest of their lives.

Underlying this argument, as indeed many of the other contentions the Government makes in its brief, is the assumption that naturalized citizens as a class are less loyal than the native-born, and therefore more likely to abandon their allegiance to the United States.

Counsel for the Government goes so far as to suggest that naturalized citizens are more likely to commit acts such as espionage than are the native-born (Br. 31-32). This unworthy attack, not referred to in the legislative history and concededly not mentioned in

diplomatic correspondence (Br. 31),* is a sign of the length to which Government counsel is driven to find a rationale for this legislation.

The Government denies on one hand that the classification is invidious yet it seeks to sustain the legislation on the obviously invidious ground that naturalized citizens *as a class* are more likely to abandon their allegiance to the United States. This, we submit, is as odious or as unconstitutional as saying that because one racial group is believed by the Congress to have *as a class* a lower educational level than another, that all members of the group may be denied admittance to a state university. If classifications of this character are permitted, then Congress could just as easily say that because it thinks naturalized citizens are more likely to be disloyal than the native-born, naturalized citizens will not be issued a passport, while native-born citizens may travel freely.

In the first place, this slur on the loyalty of naturalized citizens which permeates the Government's entire brief is completely unwarranted and not supported by any facts. In addition, it is completely contrary to the constitutional requirements of due process.

Congress, under certain circumstances, may attach to a particular *act* connoting lack of allegiance the consequence of expatriation. But Congress may never enact legislation to restrict a group of citizens on a discriminatory basis on the theory that one group of citizens—*as a group*—are more likely to lack allegiance to the United States than another.

Such group legislation, particularly when based on national origin, is simply not permitted by the Constitution. Such group legislation may of course be

* The abbreviation "Br." refers to Respondent's Brief.

more simple to administer. But our Constitution, protects personal rights and does not allow Congress or the Government the administrative convenience of such legislation. Congress may not restrict the rights of a group of citizens on the basis of such factors as race, ancestry or national origin. Even if it were proved that such a group were more prone to involvement in certain problems than other groups, Congress must deal directly with the act which it considers evil and not with the group which it believes may be more likely to commit such an act. Otherwise it would no doubt be possible to justify many classifications between groups of citizens on a so-called "rational" basis. No doubt evidence could be presented showing that certain characteristics or propensities exist more among citizens of certain national origins than others. This, however, does not mean that Congress may base legislation on the basis of such factors. So far as Congress is concerned, such factors under our system of Government, are and must be completely irrelevant.[3]

The Congress has no power to segment and compartmentalize the citizenry and regulate them on the basis of assumed characteristics or tendencies of their race, religion, national origin or economic class. It must apply the same consequences to the same act whether or not, *a priori* or even on the basis of past conduct sub-

[3] The absurdities of the contrary approach here suggested by the Government are endless, *e.g.*, since experience teaches that those guilty of petty larceney are most often poor, and those guilty of violations of the antitrust laws are most often not poor presumably a rebuttable or conclusive presumption could be applied to persons charged with such crimes depending only on proof of their economic status. This would certainly eliminate administrative inconvenience and would avoid trials which are "cumbersome, long-drawn out and expensive to the Government." See note 5, *infra*.

stantiated by statistics, it was more likely to be committed by a Jew, a Catholic, a Negro or a naturalized citizen, or indeed a poor man or a rich man.

The Government indeed has been able to cite only a single case where this Court has upheld a discrimination based on a factor such as national origin. *Hirabayashi* v. *United States*, 320 U.S. 81. There the classification, as the Court expressly stated, was upheld only because of the existence of war and the imminent threat of invasion. In *Hirabayashi*, 320 U.S. at 100, this Court said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."[4]

[4] The other cases cited in support of a classification such as made here involved classification between aliens and citizens or between aliens ineligible for citizenship and those eligible for citizenship and provide no basis for a classification of citizens.

The Government has omitted to mention a previous example of group legislation against a class of citizens whose reasoning coincides with that of the Government's brief. See *Plessy* v. *Ferguson*, 163 U.S. 537. One comment of the dissenting justice seems to us worth noting here:

> "Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens in the United States, or of Protestants and Roman Catholics?" *Id.*, 16, U.S. at 558.

The problems asserted to attend the residence abroad of naturalized citizens cannot be even remotely compared with the threat of imminent invasion. Yet short of such an imminent danger it is clear that the classification of persons on such a basis as foreign birth is prohibited under our Constitution.

In *Hirabayashi* the classification was permitted because due to the extreme exigencies of the situation there was no opportunity to separate those persons of Japanese ancestry likely to engage in sabotage and the vast majority who were loyal citizens. The State Department does, of course, have ample time and opportunity to distinguish between those citizens born or naturalized residing abroad who have abandoned their allegiance to the United States, and those who, like petitioner, are loyal Americans, and have never failed to perform in full their duties as American citizens.

No doubt, as the legislative history indicates, this process sometimes involves administrative difficulty, or if conducted by the courts judicial time and energy.[5] The protection of rights on a personal basis necessarily involves difficulties to the Government, but this is the business of a government of a free people.

In summary, Congress has no power to base expatriation on an act unless that act is inconsistent with American citizenship. Mere residence abroad clearly is not an act of this character. Nor can it be assumed:

[5] Indeed the Cabinet Committee considered having the function of taking away citizenship entrusted to the courts, but rejected this on the ground that "proceedings in the courts would be cumbersome, long drawn-out, and expensive to the Government . . ." (Nationality Laws of the United States (1938), part 1, House Committee Print, 76th Cong., 1st Sess., p. 70).

as the Government suggests, that residence abroad is such an act because some naturalized citizens who reside abroad may have in fact abandoned their allegiance to the United States. It is not appropriate as pointed out above to revoke the citizenship of those who have maintained their allegiance because others have not.

III. Congress May Not Impose Any Conditions Upon the Grant of Citizenship By Naturalization

The Government in an effort to find some Congressional power on which to base this legislation suggests that the discrimination between naturalized and native-born citizens can be justified on the theory that a naturalized citizen, because he acquired his rights of citizenship by naturalization, may be subject to restrictions and conditions not imposed on the native-born.

The Government refers to the following statement contained in the letter transmitting the report of the Cabinet Committee to the President.

> "The admission of an alien to the privilege of American citizenship is subject to the condition that he intend to reside permanently in the United States and perform the duties of a citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a native definite termination of his American citizenship should follow." (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. p. 409 1940), Nationality Laws of the United States (1939), part 1, House Committee Print, 76th Cong., 1st Sess., p. VII.)

Or as the Cabinet Committee stated even more plainly in its report:

> "... before an alien is admitted to the privilege of citizenship, under the laws of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted." (Nationality Laws of the United States, *supra*, p. 70).

The Cabinet Committee apparently conceived of this legislation as an attack on the original naturalization. As such, the statute would, of course, raise a conclusive presumption of bad faith from acts occurring later and not contemplated or foreseeable at the time of naturalization. Sought to be sustained on such grounds, the legislation would be clearly arbitrary, as the facts of this case plainly show.[6] *Cf. Bailey* v. *Alabama*, 219 U.S. 219; *Tot* v. *United States*, 319 U.S. 463; *Heiner* v. *Donnan*, 285 U.S. 312.

The Government apparently, however, does not seek to sustain the legislation as an attack on the original naturalization. Rather it suggests that Congress could impose on naturalized citizens a residence requirement so that naturalized citizens, who take up residence abroad for reasons unforeseeable at the time of naturalization, would nevertheless lose their citizenship. The Government, with apparent approval, quotes a statement made by the United Kingdom delegate to an international Conference on the Elimination or

[6] Petitioner was naturalized at the age of 16 through the naturalization of her mother and met her husband only years later. Accordingly, at the time of her naturalization, she clearly could not have foreseen or intended that she would marry a German lawyer and take up residence in Germany.

Reduction of Future Statelessness to the effect that "the naturalized person was expected to justify his acquisition of nationality by a higher standard of behaviour . . ."[7] (Br. 47). This presupposes that naturalized citizens represent a class of citizens whom Congress may subject to requirements, restrictions and qualifications not imposed on the native-born.

The Constitution, however, does not empower Congress to create different classes of citizenship. Under the Constitution there is only one citizenship of the United States. Persons may, of course, acquire citizenship by different means. A person may be born a citizen of the United States, or obtain citizenship through naturalization. Congress may, of course, pass laws stating under what circumstances citizenship is acquired by birth (Section 301 of the Immigration and Nationality Act of 1952, 8 U.S.C., § 1401) and may, as the Constitution expressly provides, "establish a uniform Rule of Naturalization" (Constitution, Art. 1, Section 8, Cl. 4). A person who claims to be a native-born citizen may be denied the rights of citizenship and even deported upon judicial determination that his claim of citizenship is false. *Ng Fung Ho* v. *White*, 259 U.S. 276, 281-284. Similarly, the citizenship of a person who was naturalized by making a false statement on his application for naturalization may be revoked by judicial action. Section 340 (d) of the Act, 8 U.S.C. Section 1451(d), *Luria* v. *United States*, 231 U.S. 9.

However, once a person has validly become a citizen of the United States, be it by birth or by naturalization,

[7] Summary Record of the 15th Meeting of the Committee of the Whole, U.N. Conference on the Elimination or Reduction of Future Statelessness (U.N. 1961), p. 10.

his rights as a citizen are the same as those of every other citizen. Congress cannot create a class of citizens whose rights or obligations are greater or less than those of other citizens. This is the plain meaning which Chief Justice Marshall attached to the Constitution in his decision in *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat) 738, quoted on pages 23-24 of our principal brief. See also *United States* v. *Wong Kim Ark*, 169 U.S. 649 and *Luria* v. *United States*, *supra*. It is also clear from the plain language of the Fourteenth Amendment which provides for the citizenship of

> "All persons *born or naturalized* in the United States . . . ." (emphasis supplied).

It is not possible, therefore, to speak of naturalized citizens and native-born citizens as two classes of citizens. There are only citizens of the United States. The adjectives "naturalized" and "native-born" simply describe the method of acquisition of the status of a citizen.

The challenged legislation, therefore, cannot be sustained on the theory that Congress may impose a different or higher standard of behavior on naturalized citizens than it does on the native-born or to condition the grant of citizenship on the future performance of duties and obligations not imposed on citizens generally. If the statute were upheld on the theory that naturalized citizens are in effect citizens on probation subject to special regulations, then naturalized citizens would plainly be relegated to a second-class citizen status. Such a status would be contrary to the plain meaning and the spirit of the Constitution.

IV. The Legislation Cannot Be Sustained as an Exercise of the Foreign Affairs Power

The foregoing discussion places in perspective the Government's contention that the challenged legislation may be sustained as a means to solve problems attending the residence abroad of naturalized citizens.

We shall demonstrate furthermore that in no event is the legislation an appropriate means to deal with any problems attending the residence abroad of naturalized citizens.

As shown in our principal brief, this legislation could not be justified on this ground if actual problems thought to be created by the residence abroad of naturalized (or born) citizens could readily be dealt with by legislation of a more limited character.

The Government's brief fails to demonstrate such a need for this discriminatory and broadly restrictive legislation.

The Government urges that the legislation is an appropriate means to deal with foreign affairs problems caused by the residence of naturalized citizens in their country of origin—because of the fact that that was the country of which they were formerly citizens.

The Government, to justify the legislation on this ground, relies principally on the diplomatic history of the middle of the last century. The Government no doubt was required to reach so far back because the legislative history itself contains no specific references to cases where the United States was involved in international complications with foreign governments because of the residence abroad of naturalized citizens.

Nor presumably was the Government able to find such instances in more recent diplomatic history.

Congress in enacting this legislation did not consider this diplomatic history. It was not even mentioned in the legislative history. Indeed, even if these problems had been considered by Congress, they could not have formed a basis for this challenged legislation. As an analysis of the diplomatic history will show, the problems which were acute in the middle of the last century had been effectively solved by the time the challenged legislation was enacted, and Congress, in adopting this provision in 1940 had different things in mind.

Diplomatic History

There is no doubt, as the Government points out, that during the middle of the last century the United States had difficulties in providing protection for naturalized citizens while sojourning in the country of origin. This problem arose out of the unwillingness of many of the European countries to recognize American naturalization. These countries held to the old dogma that allegiance can not be cast off without the consent of the sovereign. "The most vexatious cases with which this Government had to deal were those where persons, natives of states of continental Europe which maintain large standing armies, came to the United States and were naturalized, and, upon return for pleasure or business to the country of their origin, were seized and drafted into the armed services." Van Dyne, *Citizenship of the United States*, 1904, pages 283-284. To such states naturalized citizens of the United States could not travel except at serious risk.

In 1868 Congress formulated into law the policy that a citizen had a right to expatriate himself, and that

the country of former nationality had no call upon a naturalized citizen's services. Act of July 27, 1868, 15 Stat. 224. This law declared that "the right of expatriation is a natural and inherent right of all people . . ." and provided in Section 2 that:

> "All naturalized citizens of the United States while in foreign countries are entitled to have and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."[8]

"The immediate occasion which called forth the law was the arrest of certain naturalized citizens by their parent countries, chiefly the German states, for nonperformance of military service and numerous arrests of naturalized citizens of Irish origin in the United Kingdom charged with crimes of political character . . . Allowing for the heat occasioned by the nature of the arrests, the action of Congress . . . was taken with deliberation and with the unanimous agreement on the principle involved, and must be considered a final expression of national policy." Citizenship of the United States, Expatriation and Protection Abroad, House Doc. No. 326, 59th Cong., 2d Sess., pp. 10-11.

While United States policy that naturalized citizens should receive full protection was clear, the implementation of that policy was difficult in the light of the attitudes of some of the European countries. The United States attempted to resolve these difficulties by entering into naturalization treaties with some of the countries which were refusing to recognize American citizenship. These treaties are called the Bancroft treaties after the United States Minister to

[8] This provision is still the law, 22 U.S.C. § 1731.

Prussia who negotiated the first such treaty with the North German Federation in 1868. 15 Stat. 615. The purpose and background of this first such treaty appears clearly from a letter sent by Mr. Seward, the Secretary of State, to Mr. Bancroft, on August 22, 1867, 3 Moore *Digest of International Law* (1906), p. 358, where he states:

> "You are familiar with the never ending dispute between this Government and those European governments which claim to exact military service from persons born within their allegiance, but who have become naturalized citizens of the United States . . . It is in our intercourse with Prussia that the question produces the most serious inconveniences.
>
> "Soon after the close of our Civil War, Count Bismarck made some offers to the United States which were conceived in a spirit of great liberality. Your predecessor . . . was hopeful that through the negotiation thus opened, the two governments might arrive at a satisfactory conclusion of the question. It soon became apparent, however, that the United States could not surrender the principle of the absolute right of expatriation, while on the other hand Prussia was not prepared to acknowledge the principle in its full extent."

The Bancroft treaties effected a compromise between the claim of the United States that the naturalized citizens were only citizens of this country and the assertion of some of the European countries that these citizens could not escape their military obligations by acquiring American citizenship. The treaties made it safe for naturalized citizens to reside in their country of origin for a limited period of two years. After that they might become subject to the foreign power

and could have no assurance of protection on the part of the United States. This was clearly not an ideal solution, but a solution necessitated by the then existing circumstances. Furthermore, the Bancroft treaties did not automatically deprive citizens of their right to American citizenship upon residing for two years in the country of their origin, but only created a rebuttable presumption that a naturalized citizen who lived in his country of origin for that period intended to abandon his United States citizenship. 3 Moore's *International Law Digest* (1906), pp. 746-747, 748, 752.

These naturalization treaties clearly can provide no precedent for the withdrawal of citizenship under the challenged legislation. The treaties dealt with a situation presented by the refusal of a country to recognize American naturalization. The treaties secured for naturalized citizens the right to travel fully protected to his country of origin. This right apparently could only be secured, however, by this country agreeing not to claim as a citizen a person who resided there for a longer period. It is a completely different thing, as Section 352 does, to deprive naturalized citizens of their citizenship even though they reside in a country which recognizes American naturalization, as today nearly all countries do (including, of course, the Federal Republic of Germany where petitioner resides).

In 1906 and 1907 Congress passed legislation dealing with naturalized citizens. The Naturalization Act of 1906, 34 Stat. 596, made the intention to reside permanently in the United States a prerequisite for naturalization and established a rebuttable presumption that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed fraudu-

lent and subject to revocation. The purpose of this statute was to assure that "some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection." H.R. Rep. No. 6431, 59th Cong., 2d Sess., p. 2. This provision is still the law now contained in Section 340(d) of the Act, 8 U.S.C. § 1451(d). In the Act of March 2, 1907, 34 Stat. 1238, which is discussed on pages 25-26 of petitioner's principal brief, Congress set a time limit on the period in which the United States would provide diplomatic protection to a naturalized citizen who resided abroad. The Act provided that if a naturalized citizen resided abroad for certain periods a presumption would arise that he had voluntarily abandoned his citizenship. This Act, however, did not deprive the person of citizenship as such, but only of the right to protection. It had no application to the citizen who returned to the United States no matter how long he had stayed abroad. 28 Op. Attny. Gen. 504 (1910) Furthermore, the presumption could easily be rebutted by an expressed intent to remain a United States citizen. *United States v. Gay*, 264 U.S. 353. The 1907 Act was passed to implement the naturalization treaties and for considerations similar to those which led to the conclusion of those treaties.

Legislative History

In 1940 Congress enacted the challenged provision. If in 1940 there had been serious difficulties in securing the recognition of American naturalization, as there were in 1868, this provision then might, as the Government suggests, be some sort of development from the naturalization treaties and the earlier acts. The fact is, however, that the legislative history does not

indicate nor does the Government contend that in 1940 any such problem existed. Such problems were not even considered by Congress, nor could they be in any way a basis for the legislation. Congress is required to deal with current problems and not to cope with problems of past generations which have been solved and are of no present concern. The problems of the middle of the nineteenth century, such as the impressment of American citizens into foreign armies, are completely irrelevant to the question whether the challenged statute was an appropriate means to deal with current problems.

The legislative history indicates that Section 352 was enacted by Congress not because naturalized citizens residing abroad cause more problems than the native-born, but rather because it felt that any possible involvement in diplomatic problems on behalf of naturalized citizens residing abroad was not worthwhile because it believed many such naturalized citizens were only nominal citizens who had no attachment to the United States. A reading of the following portions of the legislative history quoted or cited by the Government in its brief makes this point perfectly clear.

Thus, for example, Chairman Dickstein of the House Committee said that the bill would

> "relieve this country of the responsibility of those who reside in foreign lands and *only claim citizenship when it serves their purpose.*" (86 Cong. Rec. 11944). (Emphasis supplied)[9]

[9] The Congressmen meant, of course, citizens who claimed rights, but refused responsibility. Of course, citizens who have not failed in their allegiance have a right to claim citizenship and the protection of the Government "when it serves their purpose."

The Senate report on the bill has stated (S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4):

> "These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State *nominal citizens* of this country who are abroad *but whose real interests, as shown by the conditions of their foreign stay, are not in this country.*" (Emphasis supplied)

Similarly, the Cabinet Committee Report, Nationality Laws of the United States, *supra*, p. 71, stated:

> "Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated."

Furthermore, the Cabinet Committee, which proposed the challenged legislation, cited thirteen cases as typical of the problems with which the statute should deal. Nationality Laws of the United States, *supra*, 72-75. None of these cases involved any alleged difficulties with foreign countries resulting from the fact that the naturalized citizen was residing in his country of origin. All of them were merely cases of protracted residence abroad, and most involved a breaking of all ties with this country. Some of the cases involved acts, such as serving in a foreign army, which are, of course, inconsistent with American citizenship.

That it was not the intention of Congress to deal with the specific foreign policy problems which may arise when a naturalized citizen resides in the country of his origin is also evident from the fact Congress also made residence in a foreign country other than the country of origin an expatriating act. (Section 352(a)(2)). The special problems to which the Government has referred which may arise when a naturalized citizen resides in the country of his origin have no applicability when a naturalized citizen is residing in a third country. The only possible theory which may be detected in the legislative history for making residence both in the country of origin and in another country an expatriating act is that naturalized citizens who take up residence abroad may be deemed to have no allegiance to the United States, while no such assumption is made with respect to the residence abroad of native-born citizens.

Accordingly, it is clear from the legislative history that Congress enacted the statute to deal with the problem of the "nominal citizen" who demands the advantages of American citizenship, including diplomatic protection, but whose real allegiance lies with a foreign country. It is on this basis that the challenged legislation must be judged. On this basis, however, it can not be sustained. As shown under II above, it would be unconstitutional because it assumes that all naturalized citizens living abroad as a class are "nominal citizens" while the native-born residing abroad are not, and because it operates to withdraw citizenship regardless of the allegiance of the individual naturalized citizen to which it applies.

As stated in more detail in our principal brief, p. 46, Congress was required to deal with actual problems

and to limit its measures to such as might be appropriate to deal with such problems. *Perez v. Brownell, supra; cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349.

Unquestionably the person who resides abroad as an American citizen, but who has no allegiance to the United States, represents a problem with which Congress may deal. Congress to deal with this problem has attached expatriation to certain acts demonstrative of lack of allegiance to the United States whether they be performed by native-born or naturalized citizens. (Section 349 of the Act). Other similar measures may be possible. It is clear, however, that this problem cannot be dealt with by depriving naturalized citizens who reside abroad of their citizenship regardless of the allegiance to the United States on the theory that naturalized citizens who reside abroad may be assumed as a group not to have allegiance to the United States.

Furthermore, it is clear that the problem of the American citizen residing abroad who has in effect abandoned his allegiance to the United States is not one which is limited to naturalized citizens. Indeed, there is nothing in the legislative history to show that this is a problem which is more prevalent among naturalized citizens residing abroad than among native-born expatriates. That more such cases of naturalized citizens came to the attention of the State Department is simply because under the 1907 Act naturalized citizens residing abroad were required to show that they had not given up their allegiance to this country while no such requirement was imposed on the native-born.

Unable to find a justification for the legislation in more recent diplomatic history or in the legislative history of the Act, the Government posits certain theo-

retical problems which conceivably might attend the residence abroad of naturalized citizens. As we stated in our principal brief, this legislation affecting the right of citizenship could in no event be justified except if required to resolve urgent or pressing problems of a current nature. The mere theoretical possibility of a problem would not be enough to justify the legislation.

Indeed, counsel on behalf of the Secretary of State has tried hard to imagine problems which could exist with reference to naturalized citizens which do not exist with respect to born citizens. The Department itself, however, in its own operations has treated the matter in a way which belies the arguments made here on its behalf. For, contrary to the assumption that naturalized citizens residing abroad present problems different from the native-born citizen residing abroad, the Department of State which duly keeps a record of the number of American citizens residing abroad (over 670,000) was unable to supply us with any statistics as to the number of those persons who were born citizens and the number who were naturalized. Thus, in its operations the Department of State takes the position that it is concerned with how many American citizens are residing abroad and where they are residing, but that (except as the statute here involved requires it to be so concerned) it has no interest in whether the citizens residing abroad are born or naturalized. The practice of the State Department, as opposed to its arguments here, belies the suggestion basic to the Government's contentions here and indicates that naturalized citizens residing abroad present a problem no different in character from the problems presented by the residence abroad of born citizens.

Moreover, it is clear that the problems which the Government contends may attend the residence abroad of naturalized citizens are problems of a special and limited character. They are problems which can be dealt with by specific legislation without restricting the rights of naturalized citizens whose residence abroad does not present any foreign affairs problems different from the residence abroad of native-born citizens.

(a) The Government contends that when naturalized citizens reside in their country of origin, the foreign government is "likely to extract the performance of various obligations or services." (Br. 31) This country then, the Government says, will generally be called upon to intervene in one way or another and thus frictions from the foreign country are likely to result. (Br. 31) Such an eventuality could, we assume, apart from the problem of dual nationality, occur only if the foreign government fails to give full recognition to the American naturalization of its former citizen.

In our principal brief, p. 39, we stated that since the vast majority of countries, including Germany where petitioner resides, recognize American naturalization, this problem which applies to a very small number of naturalized citizens could easily be dealt with specifically without restricting the rights of many naturalized citizens who reside in countries which recognize American naturalization.

The Government does not dispute the fact that most countries recognize American naturalization. It states rather on page 36, note 29, of its brief that to limit this legislation to such countries which do not recognize such naturalization would make it dependent

> "upon the ever changing policies and laws of other countries; it would thus make a citizen's status perilously unpredictable and would impose what has been found to be a difficult administrative problem."

This, we submit, cannot justify depriving of his citizenship a naturalized citizen who resides in a country which clearly recognizes the naturalization. Where the basic personal right of citizenship is at stake, the Government must resolve the administrative problems involved by means other than depriving persons of fundamental rights in order to avoid considering the facts as they exist. Furthermore, it would hardly seem to be an undue burden on the State Department and its embassies and consulates throughout the world to keep advised of the laws and policies of various foreign countries on this point, particularly where this appears to be a problem in only a few countries. Nor would such more limited legislation make the status of the citizen unpredictable. The State Department could advise American citizens that a particular country fails to recognize American naturalization and that the citizen who does limit his stay must face certain consequences.[10]

b. The Government, to support the legislation as an exercise of the foreign affairs power, further argues that it is designed to reduce the occurrence of dual nationality. (Br. 33)

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[10] The Government also contends that such legislation "might well engender antagonisms with the isolated nations to which it had application, presenting a still further international complication." It seems to us far fetched that a nation which did not recognize American naturalization could be seriously antagonized by the State Department's conclusion that this was the case.

The Government states that some naturalized citizens are dual nationals, and some become dual nationals because of their residence in the country of their origin. Accordingly, by expatriating naturalized citizens who reside abroad, the number of dual nationals is reduced.

Dual nationality is, of course, not a problem limited to naturalized citizens. Many naturalized citizens are not dual nationals, and some native-born citizens are. Moreover, if Congress wants to deal with the problem of dual nationality, it can deal with that problem directly. This, in fact, has been done in Section 350 of the Act. Dual nationality, if necessary, can presumably be the subject of further legislation.

The Government also contends that the legislation will have the effect of reducing the number of dual nationals since naturalized citizens who reside abroad may have children who are dual nationals. Again, this is not a problem limited to naturalized citizens. If petitioner had been born in the United States, instead of naturalized, her children would also be dual nationals. The Government adds that it is probable that such children would have "stronger attachment to the foreign country of their birth and residence than to the United States." (Br. 34) The problem of children raised abroad is not one limited to children of naturalized citizens. If children who are raised abroad, and have never resided in the United States, present a problem this can be, and in fact is, the subject of other legislation. Petitioner's children, for example, would lose their American citizenship if they fail to come to the United States prior to the age of 23 to live here for at least 5 continuous years. Section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7).

Finally, the Government argues, that Congress is not required to deal with the specific problems which may in certain circumstances attend the residence abroad of naturalized citizens, but that it may deal with naturalized citizens broadly. The Government relies on this Court's remark in *Perez* that Congress may deal with difficulties jeopardizing the successful conduct of international relations "on more than an *ad hoc* basis." 356 U.S. at 59.

In making this argument the Government ignores the obvious distinction between this case and *Perez*. The act involved in *Perez*, voting in a foreign political election, was one which by the majority of the Court deemed to be an act which was in and of itself likely to embarrass the United States. What the Court said in *Perez* is that where an act is of such a nature Congress was not required to limit the consequence of expatriation to those instances where the act actually causes difficulties in the conduct of foreign affairs. It did not say, as the Government apparently suggests, that the Congress did not have concern itself with whether or not the particular citizen committed the particular act and that, for example, Congress could expatriate all citizens residing abroad because some or many might vote in foreign elections.

Further residence abroad, is an act which in and of itself plainly does not embarrass the United States in the conduct of its foreign affairs. Such residence can cause difficulties only in certain special, definable situations, as perhaps where a state does not recognize American naturalization. The legislation therefore must be limited to those situations where the act of residence abroad is likely to cause difficulties. This is not dealing with the problem on an "ad hoc basis,"

but restricting the scope of the legislation so as to make it consistent with vital and fundamental notion of American citizenship and to keep it from being "inappropriate to the difficulties to be dealt with." *Perez* v. *Brownell*, 356 U.S. at 60.

CONCLUSION

Petitioner is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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